IN THE

Supreme Court of the United States

October Term, 1979

No. 79-578

FLOWERVALE, INC., EDWINA RAGER and EDWARD RAGER,

Petitioners,

-against-

INLAND CREDIT CORPORATION, PLANTATION HOUSE & GARDEN PRODUCTS, INC., STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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To the Honorable Chief Justice
of the United States and the Associate Justices
of the Supreme Court of the United States

Petitioners pray that a writ of certiorari issue to review an order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, dated April 2, 1979, which (*a*) affirmed "on the opinion of Mr. Justice Under-

wood at Special Term, dated December 1, 1977," an order and judgment of the Supreme Court of the State of New York, Special Term, County of Suffolk, entered January 13, 1978, granting summary judgment against Petitioners and dismissing Petitioners' two causes of action against Respondents, grounded in fraud; and (*b*) dismissed Petitioners' appeal from the order of the same court entered May 11, 1978, denying Petitioners' motion for renewal and reargument based upon new and additional facts.

OPINIONS AND ORDERS IN THE COURTS BELOW

The order and judgment of the Supreme Court of the State of New York, Special Term, County of Suffolk (Underwood, J.), dated January 13, 1978, is printed at Appendix 8a-9a. The opinion of Underwood J. dated December 1, 1977, is printed at Appendix 3a-6a.

The order of Underwood, J. dated May 11, 1978 denying reargument is printed at App. 7a.

The memorandum opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, dated April 2, 1979 is printed at App. 10a.

By order and decision dated April 26 1979, the Appellate Division, Second Judicial Department, without opinion, denied Petitioners' application for leave to appeal to the New York Court of Appeals. (App. 1a-2a).

By order and decision dated July 10, 1979, the Court of Appeals of the State of New York, without opinion, denied Petitioners' application for leave to appeal under *Article 6, Section 3, New York State Constitution* and *New York Civil Practice Law and Rule 5602.* (App. 12a).

JURISDICTION

The jurisdiction of this Court is invoked under *28 U.S.C. 1254(1).*

QUESTION PRESENTED

May a court grant summary judgment dismissing a cause of action, without a trial and without opportunity to be heard upon the merits, consistent with due process of law, where the documented facts present material triable issues of fact?

CONSTITUTIONAL PROVISIONS INVOLVED

The *Constitution of the United States, 14th Amendment:*

". . . nor shall any State deprive any person of life, liberty, or property without due process of law, . . . "

STATUTES INVOLVED

New York Civil Practice Law and Rules

Rule 3212. Motion for summary judgment

(a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined.

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shali appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

Rule 5501(c). Appellate Divsion. The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court *** determining the appeal.

STATEMENT OF THE CASE

Petitioner's Complaint Below

On April 19, 1976, Petitioners instituted an action in the Supreme Court of the State of New York, County of Suffolk, against Respondents, to vacate a purported judgment of mortgage foreclosure entered by default against the Petitioners on November 28, 1975, on the ground of fraud in the procurement of the judgment of foreclosure.

Petitioners' verified amended complaint consisted of two causes of action. (Appendix 13a-27a).

The *first cause of action* was to vacate the purported judgment of foreclosure and the Referee's Deed issued thereunder on the ground of fraud in the procurement thereof. (Appendix 13a).

The *second cause of action,* demanded judgment for compensatory and punitive damages in the sum of Ten Million Dollars. (Appendix 23a).

The fraud perpetrated by Respondents was documented in a written agreement entered into between Petitioners and Respondents, on the letterhead of Respondent Inland Credit Corporation, (hereinafter called "Inland"), signed and initialled by Respondent Oscar Dane on December 6, 1974, expressly agreeing not to foreclose Petitioners' property of Flowervale, Inc., or their property at 16 East 65th Street, New York City, in consideration of the terms and conditions set forth therein. The written agreement was annexed to the verified amended complaint as *Exhibit A*. (Appendix 25a).

The salient allegations as to each cause of action were substantially set forth as follows:

Petitioner Flowervale Inc. was the owner of a flower-growing wholesale and retail enterprise in Suffolk County, State of New York, consisting of 7½ acres of land and buildings, having a total market value and reasonable worth of approximately One Million Dollars (par. 3, Verified Complaint).

Petitioners Edwina Rager and Edward Rager were the sole owners, officers and stockholders of Flowervale, Inc. (par. 4).

The fair and reasonable equity belonging to Petitioners in their Flowervale property, was approximately $800,000. (par. 15-16).

Petitioner Edward Rager was an attorney at law, and represented the petitioners Flowervale, and his wife, Edwina Rager, as plaintiffs therein (par. 22).

Edwina Rager and Edward Rager were also the sole stockholders and owners of Inspiration Enterprises, Inc. (hereinafter called "Inspiration"), the owner of real estate and premises 16 East 65th Street, New York, New York (par. 5), having a fair market value and reasonable worth of $450,000. (par. 6). The fair and reasonable value and worth of the equity belonging to Petitioners in their real property at 16 East 65th Street, New York, was approximately $175,000.

Respondent Inland engaged in the principal business of second mortgage financing of real property (par. 7).

Respondent Plantation House & Garden Products, Inc. (hereinafter called Plantation), a Delaware corporation, was incorporated in 1972, shortly after Respondents had placed their mortgage loan on Petitioner Flowervale. Plantation is a wholly-owned and controlled subsidiary corporation of Inland (par. 8).

Respondents Stanley E. Stern (hereinafter called Stern) and Oscar Dane (hereinafter called Dane) were the principal officers and sole stockholders of both corporations (pars. 9-11). Respondent Harold Greenstein (hereinafter called Greenstein) was Executive Vice President of both corporations (par. 12).

On May 2, 1972, Inland issued a second mortgage loan to petitioner Flowervale Inc. in the sum of $100,000. (par. 13) On

the same day, Respondents also issued a second mortgage loan for $160,000. covering petitioners' property at 16 East 65th Street, New York, New York (par. 13).

On December 6, 1974, by means of the fradulent representations set forth in its letter agreement with petitioners as aforestated, Respondent tricked and deceived petitioners into deeding their valuable property at 16 East 65th Street, New York, to the respondents.

The letter-agreement dated December 4, 1974, which was signed and initialled by the parties on December 6, 1974, specifically set forth as follows:

INLAND CREDIT CORPORATION
685 Fifth Avenue
New York, New York 10022 (212) 687-3400

December 4 1974

Mrs. Edwina Rager, President
Inspiration Enterprise Inc.
29 Maple Street
Blue Point, Long Island

Re: 16 East 65th Street

Dear Mrs. Rager:

Pursuant to conversation among Mr. Dane, Mr. Greenstein and Dr. Rager, we have agreed as follows:

You will sign a deed to the above property in lieu of foreclosure. This deed will be made to ARDISCO FINANCIAL CORPORATION, which is a wholly owned subsidiary of Inland Corporation. Upon receiving the deed, we and Ardisco Financial Corporation will use its best efforts to sell the property, including placing of proper sign on building and diseminating information to brokers, and from the proceeds of the sale will pay the first and second mortgage and accrued interest, real estate taxes and any additional expenses incurred in connection with the sale. Any surplus after the above payments, it will pay to Inland Credit Corporation for the arrears of interest and taxes on the Flowervale property and any surplus beyond that will be used to reduce the principal amount of the Flowervale mortgage.

You are granted, upon signing of the deed, sixty (60) days to remove all personal property from the building.

Very truly yours,
INLAND CREDIT CORPORATION
Oscar Dane
Chairman of the Board

OD/mez

Several penned insertions made therein by Petitioner Edward Rager were initialled and agreed to by Inland, as follows:

"With leave to Edward Rager to use his efforts to effect an advantageous sale."

"You are granted leave to occupy the premises first and second floor and basement as heretofore, sixty days from the sale to remove all personal property from the building."

"In Flowervale: No default unless Suburbia grants no extension and intends to foreclose."
(Appendix 25a).

The express intent of the parties, plainly set forth in the agreement, was to sell the property at 16 East 65th Street, New York, apply the proceeds of the sale to satisfy the Flowervale mortgage, and Petitioners would thus be enabled to carry on the Flowervale nursery business and livelihood for the retail and wholesale sale of flowers. Respondents' two mortgage loans would thus be fully paid "in lieu of foreclosure," under this agreement.

Parallel therewith, Respondent Inland entered into a written agreement on November 27, 1974, with petitioners to extend the Flowervale second mortgage to August 31, 1975. (Complaint, Ex. B, Appendix 26a-27a).

In accord therewith, petitioners believed the respondents' representations to be true, and relying upon them, did on December 6, 1974, at 16 East 65th Street, New York, New York, sign and execute a deed to Ardisco Financial Corporation, the wholly owned subsidiary of Inland (par. 21).

The complaint further alleged that Respondents, and each of them, knew the said representations to be false and fraudulent, and knowingly made such false and fraudulent representations intending to defraud the petitioners of their properties (par. 22b).

The fraudulent object and intent of Respondents was to acquire all of Petitioners' right, title and interest in and to the New York. as well as the Suffolk properties, at a fractional part of their actual worth or market value, and that by collusively defrauding them into conveying their property to Ardisco, Respondents effectively deprived Petitioners of the legal capacity to refinance the existing mortgages on both the New York and Suffolk properties at fair value, in the open market, and further, effectively deprived and wrongfully prevented them from effecting a sale of the premises upon the most advantageous terms pursuant to the terms of the letter-agreement (par. 23).

The complaint further alleged that:

To the actual knowledge of Respondents, the Petitioner Edward Rager was then and there seriously ill emotionally, mentally and physically, and was then and there in a greatly unstable, weakened and debilitated mental and physical condition, and was mentally incapable of handling or managing his affairs, either in his individual capacity, or as attorney for Petitioner, and was mentally incapacitated from protecting the legal and equitable rights belonging to them (par. 22).

Respondents fraudulently caused, precipitated, aggravated and compounded the mental illness of petitioner Edward Rager, both individually, and as attorney for Petitioners, thus preventing Petitioners from taking any legal action or counter-action against them, or from interposing a proper defense or defenses on the merits to any foreclosure action or summary dispossess proceeding against Petitioners which Respondents, and each of them, then and therer fraudulently contemplated taking against them, as aforesaid (par. 22a).

In further effectuation of their corrupt intent to deceive and defraud petitioners, Respondents did on said December 6, 1974, then and there, wrongfully and corruptly steal from the premises the original signed agreement, *Ex. A,* from the possession and custody of Petitioners, and did thereafter wilfully refuse and decline to return the said written agreement, or provide a photocopy of the same, despite the repeated demands by Petitioners therefor (par. 26).

Further, notwithstanding Respondents' express representation and agreement not to foreclose either the New York property or the Suffolk County property, Respondent Inland did, in or about January 29, 1975, fraudulently and corruptly institute a foreclosure proceeding against Flowervale, in Suffolk County, under *Index No. 75/1968,* and did thereafter procure a judgment of foreclosure by default on October 30, 1975, entered November 28, 1975, and did cause the issuance of a purported Referee's Deed in foreclosure on or about January 7, 1976, to Respondent Plantation, a wholly-owned subsidiary of Inland (par. 28).

Further, and at the same time, Respondents did also on or about January 27, 1975, fraudulently institute and prosecute a foreclosure action against Petitioners' property, 16 East 65th Street, New York, County of New York, *Index No. 2166/75,* and did wrongfully cause Petitioners to default thereunder, and did, on October 28, 1975, procure a purported judgment of foreclosure by default and sale of the mortgaged premises, and did on December 11, 1975, cause a purported Referee's Deed in Foreclosure to be conveyed and delivered to Inland (par. 27).

The complaint further alleged that immediately subsequent to December 6, 1974, as aforestated, and in effectuation of their intent to defraud, Respondents wantonly demanded that Petitioners forthwith surrender the possession and occupancy of the premises 16 East 65th Street, New York.

In further effectuation of their intent to deceive and defraud petitioners, the Respondents wilfully thwarted them

from selling the property upon the most advantageous terms, as agreed, and did wrongfully and wantonly sabotage, frustrate, defeat and discourage all potential buyers, as well as all potential efforts by Petitioners to find a suitable buyer, or to sell the property at 16 East 65th Street, New York, New York, for the agreed purposes aforesaid, as provided in the letter-agreement, (par. 24).

Further, Respondents wantonly failed and neglected to maintain or service the premises, or to keep it in good repair and condition; and did wantonly and maliciously cut off and vandalize the heating system, elevator and intercom system in the lobby of the building, and further, did maliciously and wantonly harass, malign and villify Petitioners Edward Rager and Edwina Rager, and did repeatedly attempt to intimidate and terrorize them into surrendering and abandoning the occupancy and possession of the premises forthwith to them (par. 25).

Wherefore, Petitioners demanded judgment declaring the judgment of foreclosure null and void on the ground of fraud in the procurement of the judgment, and that the judgment of foreclosure be vacated.

In the *Second cause of action* for monetary damages, Petitioners re-alleged the identical facts set forth with specificity in the first cause of action.

Petitioners alleged that, by reason thereof, they were seriously damaged and injured in their person and in their property, and suffered great and permanent economic loss; that Petitioners Edwina Rager and Edward Rager have suffered, now suffer, and will continue to suffer for an indefinite period in the future great mental anguish, and severe emotional distress and illness, all to their damage in the sum of $10,000,000. for compensatory and punitive damages (pars. 30-31).

Respondents' Answer

Respondents' Answer to Petitioners' Complaint denied each of the allegations of fraud contained in the Complaint.

Respondents further categorically denied pars. 8, 17, 18 and 19 of the Complaint which specifically alleged that Respondent Inland had entered into two written agreements on December 6, 1974 and November 27, 1974, as aforestated. (Pars. 1-3, answer) (Appendix 28a)

Further, Respondents categorically denied that Respondent Ardisco Financial Corporation was a wholly-owned and controlled subsidiary of Inland (par. 4).

As to the *Second Cause of Action* for monetary damages, Respondents likewise denied each of the allegations of fraud detailed in the complaint (pars. 5-6) (Appendix 29a)

Further, as a *First Affirmative Defense*, Respondents categorically alleged that "there is pending in the Supreme Court, New York County, under Index No. 4252/76, another action in which some or all of the issues pertaining to the allegations of the Complaint respecting the foreclosure of the property at 16 East 65th Street, are in litigation." (par. 7) (Appendix 29a).

As a *Second Affirmative Defense,* Respondents alleged that under the judgment of foreclosure and sale against Flowervale, in the Supreme Court, Suffolk County, under Index No. 75/1968, "each of the alleged causes of action pertaining to the Suffolk County property has been previously determined and adjudicated and is now merged in the judgment in the prior action and Appellants are barred from bringing this and any further action with respect thereto." (pars. 8-10) (Appendix

Respondents' Motion for Summary Judgment

On June 8, 1977 Respondents moved for summary judgment under *New York Civil Practice Law and Rule 3212.* The supporting affidavit of Respondent Stanley Stern as President of Inland, set forth substantially as follows:

That a foreclosure action was instituted against Flowervale by service of a summons and complaint on its then president, Edward Rager, on February 10, 1975; that instead of answering the complaint, Petitioner Edward Rager made a motion in the Supreme Court, New York County to consolidate the foreclosure action with several other actions pending in the Supreme Court, New York County, as well as the Supreme Court, Suffolk County (pars. 9-10, Aff. Stern).

That Flowervale defaulted in answering the Complaint; that by motion dated June 23, 1975, returnable July 1, 1975, Flowervale sought by its attorney Edward Rager to open up its default in answering, and submitted a proposed answer to the Complaint in the foreclosure action, (*Ex. E*); that "the allegations contained in the defenses set out in that (proposed) answer are identical both in substance and in form to the allegations of the complaint now before this Court in the instant action." (par. 10, Aff. Stern)

That on September 3, 1975, the Supreme Court, Suffolk County (Pittoni, J.) denied Petitioner Rager's motion to open the default in pleading (Appendix 63a).

The moving affidavit of Respondent Stern further stated:

"The only explanation offered in the complaint for overcoming these irrefutable facts is stated in paragraph 22, which, in substance, makes the bald, unsupported statement that Mr. Rager was at the time of the Foreclosure Action emotionally, mentally, and physically ill, and thus incapable of managing his or Flowervale's affairs. It is respectfully submitted that, as a matter of law, such nonsense cannot overcome the doctrine of *res judicata* which binds these plaintiffs to Mr. Justice Pittoni's

September 3, order and the judgment in the Foreclosure Action. Moreover, Mrs. Rager, also an officer of Flowervale and a principal in the management of its affairs could have retained any other attorney to represent the corporation in the Foreclosure Action if she had believed that her husband was unable to properly do so. *** It is also noteworthy that the complaint in this case is virtually identical in all respects to the proposed answer prepared by Mr. Rager, who these plaintiffs now contend was an incompetent." (Aff. Stern par. 16).

Further, at par. 17 of the moving affidavit:

"Mr. and Mrs. Rager simultaneously with the instituting of the instant action, brought an identical action in New York County seeking the identical relief but with respect to property located at 16 East 65th Street, New York, New York. I attach hereto as *Exhibit G,* a copy of the complaint in that action (hereinafter referred to as the "New York Action") from which this Court can determine that the action here at bar and the New York Action are identical in all material respects. *** (Appendix pp. 52a-60a).

The New York Action came on for trial on May 9, 1977 before the Hon. Martin Evans. Mr. Justice Evans dismissed the complaint and awarded possession of the premises involved to Inland who had brought a summary dispossess proceeding to regain such possession." (Aff. Stern, par. 17).

Further, at par. 19, of the Respondent's motion for Summary Judgment:

"Finally, it is respectfully submitted that the complaint, as the proposed answer in the Foreclosure Action, before it, wholly fails to state a cause of action upon which the relief requested therein can be granted. It alleges a conspiracy on the part of Inland and several of its principals to acquire Flowervale's equity in the Suffolk and New York Properties. As proof of that conspiracy, plaintiffs attach a copy of an agreement as Exhibit "B" to the complaint which does no more than extend the mortgage covering the Suffolk County Property upon certain terms and conditions. Nowhere in that complaint do plaintiffs allege that

they complied with the terms of that agreement, or that defendants did anything which prevented such compliance. Although not an issue on this motion, the facts are that neither of these mortgages covering the Suffolk County and New York Properties were paid, and, there was no compliance with the extension agreement respecting the Suffolk County mortgage upon which these plaintiffs ground the complaint now before this Court."

The affidavit of Respondent Stern further stated, at par. 20:

"The allegation made in the complaint that there was an oral agreement not to foreclose on the Suffolk County Property violates the very terms of the agreement attached to the complaint as Exhibit "B" upon which these plaintiffs rely. That agreement specifically provides that it cannot be changed or terminated orally."

Petitioners' Answering Affidavit
in Opposition to Summary Judgment

On July 1, 1977, on behalf of Petitioners, Edwina Rager submitted an answering affidavit in opposition to the motion for summary judgment, completely refuting Respondent's contentions, as follows:

"It is significant that nowhere in the moving papers herein is there a single mention or reference to the fundamental factual and legal basis for the Plaintiffs' complaint herein, namely, that the Defendants fraudulently and corruptly procured a judgment of foreclosure to be entered against Plaintiff therein, and that by reason thereof, the said judgment of foreclosure and the entire purported foreclosure action instituted by the Defendant Inland Credit Corporation against Flowervale is wholly null and void at its very inception.

Again, the affirmation of Defendant Stern, attached to the moving papers, disingenuously avoids making any reference whatever to *Exhibit A,* attached to the verified complaint herein, which written agreement constitutes the basic thrust of the causes of action grounded in fraud, as aforesaid. As is plain-

ly apparent, the within *Exhibit A* spells out the false and fraudulent representations made by the Defendants to the Plaintiffs as to the New York action, as well as the instant action herein." (Edwina Rager Aff. p. 3)

Further, Petitioners' answering affidavit set forth as follows:

"The Defendants contend further that since the New York action is virtually identical with the instant action, and that since the New York action had been "dismissed," this action shall likewise be dismissed.

We respectfully submit, in answer thereto, that following the dismissal of the New York action on May 9, 1977, as aforestated, the Court thereafter vacated the dismissal and duly reinstated the action on June 15, 1977 and the same is now pending trial before Mr. Justice Evans in the New York Supreme Court." (Aff. pp. 3-4)

Further, the petitioners' answering affidavit in opposition to summary judgment stated:

"Again the Defendant Stern misleadingly states in his moving affidavit that the Plaintiffs failed to comply with a certain mortgage extension agreement—virtually disregarding the subsequent written agreement fraudulently entered into of the defendant Inland Credit Corporation on December 6, 1974 not to foreclose either the Suffolk or New York properties in exchange for which the Plaintiffs were corruptly tricked and deceived into conveying their valuable property at 16 East 65th Street, New York City, under specific terms and conditions set forth in Plaintiffs' *Exhibit A,* attached to the complaint referred to hereinabove, setting forth substantially the terms thereof on the letterhead of the Defendant Inland Credit Corporation, dated December 4, 1974." (Aff. pp. 4-5)

In flat refutation of Respondents' allegation that the complaint referred to "an oral agreement not to foreclose on the Suffolk County property" (aff. Stern, par. 20), Petitioner Edwina Rager specifically set forth the written letter-agreement on the letterhead of Respondent Inland, signed by Respondents on

December 6, 1974, as the basis of the fraud action pleaded in the complaint, and set forth therein, as *Exhibit A*.

Petitioners' affidavit in opposition further sets forth, as follows:

"As part and parcel of the fraud and conspiracy alleged herein, the Plaintiffs will establish by convincing documentary proof upon the trial of both causes of action herein that the Defendant Inland Credit Corporation organized and created Plantation House & Garden Products as a Delaware Corporation on October 18, 1972, barely a few monts after it had made its second mortgage consolidated loan of $100,000. to the Plaintiff Flowervale on May 2, 1972 (Complaint, par. 16), and that the Defendants' conspiratorial object and design was to misappropriate the Plaintiffs' going business and property of Flowervale, Inc. at the very inception of the second mortgage transaction, as specifically alleged in the Complaint herein." (Aff. p. 10-11).

Finally, Petitioners' answering affidavit set forth that:

"Your deponent respectfully states to the Court that I have been informed by my attorneys that the sufficiency of the within cause of action has been implicitly upheld by the Appellate Division, "First Judicial Department, in connection with the litigation involving the consolidation of the within action with the pending action in the Supreme Court of New York County, which is identical on the facts and arises out of the identical fraud.

I am submitting herewith, marked *Exhibit B,* a copy of an opinion of the Appellate Division, First Department, dated November 9, 1976, in connection with the said litigation involving the proposed consolidation aforesaid.*

Again, I am informed by my attorneys that the Appellate Division, First Department, implicitly upheld the validity of the independent action that I have brought in the Supreme Court, New York County, against Defendants—which is identical with the instant action, in connection with the litigation herein concerning the Plaintiffs' right to a jury trial of the issues and facts

*The opinion is reported in *Inspiration Enterprises, Inc. et al v. Inland Credit Corp., et all,* 54 App.Div. 2d 839, Ch.J. Lupiano, dissenting, appeal dism'd 40 N.Y.2d 1014.

embraced within the action for fraud of the identical complaints in the instant action, as well as the New York action." (Aff. pp. 11-12) . *

Respondents' Reply Affirmation

The Reply Affirmation by Respondents' Attorney, Richard H. Abelson, Esq., verified August 17, 1977, sets forth *inter alia,* as follows:

"Notwithstanding the plaintiffs' contention to the contrary, the basis of this action is not a "fraud in the procurement of the mortgage foreclosure judgment" by which Inland derived title to the property at issue. Rather, to the extent that a basis for this complaint can be found, it must be in the purported breach by Inland of an "agreement," a copy of which is attached to the complaint as Exhibit "A", which these plaintiffs contend prohibited Inland from foreclosing the mortgage covering the property here at issue, ("Flowervale property").

It is respectfully submitted that even the most careful reading of that so-called agreement, including all of the unintelligible pen insertions made by Mr. Rager after Inland had sent the letter to his wife, fails to disclose any stipulation by Inland that it would not foreclose its mortgage on the Flowervale Property if that mortgage was in default. Rather, by the typewritten portion of that letter Inland agreed to use its best efforts to sell a "parcel of property in *New York* to satisfy a mortgage covering that property and to the extent there was a surplus from such sale, those monies would be applied in the reduction of the mortgage covering the Flowervale Property. It is impossible to read into such language an agreement by Inland not to foreclose its mortgage covering the Flowervale Property,

*The opinion is reported in *Inspiration Enterprises, Inc. v. Inland Credit Corp., et al,* 57 App.Div.2d 800. The court held, *inter alia*, that the *"Plaintiffs have a cause of action to set aside a voidable conveyance."*

as modified and extended by the agreement of November 27, 1974, attached to the complaint as Exhibit "B."

The agreement of November 27, 1974, the only agreement pertaining to the Flowervale Property, among other things: (a) acknowledged a balance due under the mortgage covering the Flowervale Property of $91,805.81 and the fact that no payments of interest had been made since October of 1974; (provided that Inland would defer Flowervale's obligation to pay past due interest until the entire mortgage became due on the extended date, August 31, 1975); (c) required the mortgagor to keep current all payments of principal and interest due under the senior mortgage covering the property and (d) required compliance in all other respects with the terms, covenants and conditions of the original mortgage covering the Flowervale property." (pars. 3-6)

Petitioners' Reply Affirmation

Petitioners submitted a Reply Affirmation thereto, stating *inter alia,* that:

"In thus limiting and circumscribing the plaintiffs' action herein, the Defendants elect to disregard and completely ignore the salient allegations of the complaint centering around *Ex. A,* which spell out the essential elements of fraud in the procurement of the judgment of foreclosure by default.

"Likewise, the Abelson affidavit raises issues of fact as to the "unintelligible pen insertions made by Mr. Rager after Inland sent the letter to his wife," and further that the Inland letter of agreement "fails to disclose any stipulation by Inland that it would not foreclose its mortgage on the Flowervale property if that mortgage was in default." (Aff. p. 2)

As *Ex. A* plainly shows, the pen insertions made by Mr. Rager stipulated that, in addition to the typewritten agreement "You will sign a deed to the above property *in lieu of*

it would not foreclose its mortgage on the Flowervale property if that mortgage was in default." (Aff. p. 2)

As *Ex. A* plainly shows, the pen insertions made by Mr. Rager stipulated that, in addition to the typewritten agreement

foreclosure," there was to be no default declared as to the Flowervale property "unless Suburban (Bank) grants no extension and intends to foreclose."

The pen insertions on *Ex. A,* attached to the complaint represented in substance the final agreement signed by the Defendant on December 6, 1974, the date on which it fraudulently obtained the Plaintiffs' deed to their New York property "in lieu of foreclosure of the New York and Flowervale property in Suffolk County."

In this connection, it will be noted that the Suburban Bank, holder of the first mortgage on the Flowervale property, did not in fact declare a default, nor did the Bank declare its intention to foreclose the Flowervale property. In point of fact, the Defendants herein do not, and cannot, contend to the contrary. (Abelson Aff. p. 6)." (Nussbaum aff., p. 2)

THE DECISION GRANTING SUMMARY JUDGMENT AGAINST PETITIONERS

On December 1, 1977, the Supreme Court Special Term of Suffolk County (Underwood, J.) granted Respondents' motion for summary judgment and dismissed the complaint. (Appendix

The court's opinion held, *inter alia,* in substance as follows:

> "The court determines, after careful review of the complaint, the detailed affidavits and exhibits, that defendants' motion for summary judgment should be granted because there are no issues that warrant a trial.
>
> Plaintiffs state that the complaint alleges "fraud in procurement of the judgment of foreclosure by default." Flowervale was duly served with the summons and complaint in the foreclosure action, and it defaulted in answering. Plaintiffs were also notified of every stage of the foreclosure proceedings and could have protected their

equity in the property. Plaintiffs' reply, as previously noted, that because of plaintiff Edward Rager's condition, he could not defend the foreclosure action. Plaintiffs do not submit medical reports or other documentary evidence to establish Edward Rager's condition, which is required under the facts of this case, to successfully oppose a motion for summary judgment. Furthermore, although Rager is an attorney, he could have hired another attorney to represent plaintiffs. Additionally, his wife, plaintiff Edwina Rager, who was not incapacitated, could have hired another attorney.

Plaintiffs also contend that the agreement-letter specifically states that defendants would not foreclose if plaintiffs gave a deed to certain property to defendants. The "property" mentioned is the New York County property and not the Suffolk County property. Plaintiffs further allege that "the pen insertions by Mr. Rager stipulated that . . . there was to be no default declared as to the Flowervale property unless Suburban (Bank) grants no extension and intends to foreclose." Plaintiffs allege that Suburban did not foreclose.

"The court cannot read the language added to the agreement from the copy submitted to it. Furthermore, plaintiff Edward Rager admits that he "penned" in the additions. Plaintiffs cannot show that defendants ever agreed to this insertion. Certainly, plaintiff Edward Rager, an attorney, who owned substantial real property, knew that his 'penned' insertions, without more, did not constitute a valid and binding contract. ***

Plaintiffs are faced with another obstacle. They moved to vacate their default in the foreclosure action, which they could do. (see e.g. *Mills v. Nedza* 222 App. Div. 615), and their motion was denied. Justice Pittoni, on September 3, 1975 stated *inter alia,* "the moving affidavit in support of this motion fails to set forth facts indicating a reasonable excuse for the default, nor does it present a factual basis for a meritorious defense." Plaintiffs did not appeal Justice Pittoni's decision. The complaint in this action is very similar to the defenses contained in plaintiffs' proposed answer annexed to their affidavit in support of their

motion to vacate, which Justice Pittoni held did not present a "meritorious defense."

The doctrine of estoppel or res judicata under the facts of this case is applicable to the order of Justice Pittoni as though it were a final judgment. (see e.g. *American Equitable Corp., v. Parkhill* 252 App. Div. 260; cf. *Weissberger v. Weissberger* 266 App. Div. 973; *Baronowitz v. Baronowitz* 13 Misc. 2d 404).

Whether the alleged fraud committed by defendants is labelled intrinsic or extrinsic (see *5 Weinstein-Korn-Miller N.Y. Civ. Prac. par. 5015.09*), plaintiffs have failed to establish by sufficient proof that there is an issue to be tried. (cf. *Priester v. Sigmond*, 48 AD2d 988) ***"

PETITIONERS' MOTION FOR RENEWAL AND REARGUMENT

Petitioners duly moved Special Term to vacate the order and judgment entered January 13, 1978, and for renewal and reconsideration thereof based upon new and additional facts.

The motion for renewal and re-consideration set forth *inter alia* the following:

(a) "The Court had inadvertently overlooked the fact that *nowhere in the Respondents' moving papers or affidavits for summary judgment have they controverted the basic allegations of the complaint constituting the fraud action herein.* Instead of meeting the serious issues of fact tendered by the amended complaint, the defendants elected to mention only the mortgage foreclosure proceeding. As aforestated, the moving affidavit of the defendant Stanley Stern did not refer in any way to the letter-agreement, *Exhibit A,* attached to the complaint, or even deny or controvert the fraud allegations detailed with great specificity in paragraphs 17-28 inclusive of the complaint."

In particular, the Court completely disregarded the following documented facts:

a. That the agreement attached to the amended complaint as *Exhibit A* was actually signed and delivered by the Respondents to Petitioners on December 6, 1974, in consideration for the conveyance of the property located at 16 East 65th Street, New York, according to the terms of that agreement. (Aff. Aaron Nussbau, par. 22)

b. That the letter-agreement, containing the penned insertions by Respondent Edward Rager, was "duly signed and initialed by the defendant Dane," as specifically alleged in par. 18 of the complaint. (par. 22)

c. That nowhere in the moving papers originally submitted to the Court on the affidavit of Respondent Stern did Petitioners make any reference or response whatsoever to the letter-agreement (*Ex. A*), constituting the very crux of the fraud action herein. (par. 23)

d. That Respondents Dane and Greenstein admitted signing the letter-agreement, in examinations before trial conducted on January 20, 1977.

e. As to the penned insertion in the letter-agreement *Ex. A*, reading:

> "Flowervale: no default unless Suburbia grants no extension and intends to foreclose."

The Court completely disregarded the crucial fact that the Suburbia Bank had never declared any default of its first mortgage, nor did the *moving Respondents for summary judgment ever contend to the contrary* (Affidavit Edwina Rager verified July 1, 1977, pp. 4-5; reply aff. Aaron Nussbaum, September 29, 1977) (par. 33)

f. Flatly contrary to Respondents' representation in the letter-agreement, *Ex. A*, "to use its best efforts to sell the property, including placing of proper sign on building and

disseminating information to brokers," in order to effectuate the terms of the agreement with respect to the New York property as well as Flowervale, as alleged in the amended complaint, (see pars. 23-28) the Petitioners established in the examination before trial of Respondent Greenstein, taken on January 20, 1977, that Respondents fraudulently frustrated the letter and intent of the December 6 memorandum-agreement by immediately placing a huge sign on petitioners' building that very day, offering to *sell or lease* the property. He testified:

"I put a sign up on the building that day on December 6th," (p. 14)

That sign proposing to lease the building remains in the custody and possession of petitioners and will be produced as an exhibit upon the trial.

In flat contradiction of each other, the Respondent Stanley Stern testified in petitioners' examination before trial, taken on January 10, 1977, that the defendants "never attempted to lease the premises." (pars. 35-37)

The Court below completely disregarded the compelling documentation of Edward Rager's catastrophic mental illness contained on the very face of his moving papers to vacate the order of reference and to vacate his default in the mortgage foreclosure proceeding in Suffolk County (Respondents' *Ex. E, Motion for Summary Judgment*).

Thus, in denying Rager's motion to vacate the default, Mr. Justice Pittoni characterized Rager's supporting affidavit as follows:

> "In the *rambling, almost incoherent, moving affidavit by the attorney for the defendant,* there is no denial that the process was served, there is no explanation whatever as to why the defendant defaulted and there is no suggestion as to a meritorious action defense to the action for foreclosure." (underscoring ours) (Appendix 63a).

Further, Petitioner Edward Rager defaulted in answering, or otherwise moving, with respect to the foreclosure proceeding against Petitioner Flowervale, Inc.at bar. Instead, acting *pro se* and as attorney for Flowervale, Inc., he filed a series of bizarre motions in the Supreme Court, New York County, to consolidate the mortgage foreclosure action with five other unrelated actions pending in Suffolk County, and in the Supreme Court, New York County, including another mortgage foreclosure action instituted by the Respondent Inland against the Petitioner and Inspiration Enterprises, Inc., owner of real property 16 East 65th Street, New York, where the Ragers had maintained their home and residence, and Edward Rager had maintained is law offices, since 1957.

On April 18, 1975, the motion to "cnsolidate" the actions were denied in the Supreme Court, New York County (Helman, J.), who rendered a decision characterizing Edward Rager's motion to consolidate as an "*interminable and incomprehensible document,*" stating *inter alia,* as follows:

> "Plaintiff's first complaint was to restrain two banks from committing 'hostile acts,' whatever that term may mean as applied to these facts. The *interminable and incomprehensible document* which purports to be a 'supplemental amended complaint' succeeds in thirty-five pages containing 188 paragraphs in not giving one single fact which may form the basis for a cause of action, nor does it supply responsive pleadings in actions against plaintiffs. *Lacking also are written documents on which these actions are based.* If the court were willing to overlook this stream of continuous vituperation by a lawyer who claims 48 illustrious years at the bar, to possibly construct a complaint, it could not do so for lack of facts." (emphasis supplied).*

On April 28, 1975, Petitioner Edward Rager sent a telegram to Mr. Justice Hughes, Supreme Court, New York

*It is important that Petitioner Edward Rager's "incomprehensible document" even failed to include therein the crucial letter agreement signed December 6, 1974.

County, requesting consolidation of the Suffolk County mortgage foreclosure action and "injunctive relief."

On June 12, 1975, Mr. Justice Hughes denied the application, aforestated, holding, *inter alia,* as follows:

> "*** As far as the Court is able to determine from the almost *incoherent affidavit of Mr. Edward Rager, counsel for movants,* the application to stay all proceedings was previously made before Justice Helman, and a decision was rendered thereon denying the motions. *** *If there is any other requested relief sought, it is denied, without prejudice to renewal, upon proper papers, including a comprehensible supporting affidavit making reasonably clear the nature of the application and the relief requested. The present affidavit is totally lacking in this regard, so much so, that the Court cannot make any sense out of it.*" (emphasis supplied)

On May 10, 1975, Edward Rager sent a rambling, disjointed letter addressed to "The Honorable Justice Helman, Hughes, Fine and Postel, Supreme Court, New York County," all of whom had simultaneously received motions for various relief concerning the consolidation and injunctive relief requested, as aforestated.

Further, the Court overlooked the critical importance of *Exhibit E,* attached to the moving papers for summary judgment, consisting of a Notice of Motion dated June 23, 1975, and supporting affirmation of Edward Rager dated the same date, which affirmation attest, on its very face, that Edward Rager was in the throes of severe mental illness at that time (Appendix 48a-51a); and that he "was then and there mentally incapacitated from protecting the legal and equitable rights belonging to the plaintiffs." (par. 22 amended complaint).

In this connection, too, the Petitioners' Motion for Reconsideration and Renewal called the Court's attention to Edward Rager's Motion to Vacate the Default Judgment in the mortgage foreclosure proceeding. There, in the affidavit in opposition, in that proceeding, the Respondents themselves stressed

the plainly evident mental incapacity of Edward Rager, as follows:

> "Probably to distinguish this motion from the other, the notice of motion was addressed not only to counsel and Mr. Justice Helman, but to Governor Carey and Attorney General Levi. All of those motions were denied by Mr. Justice Hughes, by an order dated June 12, 1975, who adverted to *"the almost incoherent affidavit of Mr. Edward Rager, counsel for movants* ***" (p. 6) pars. 40-44).

As to the Court's factual finding that Petitioner Edwina Rager could have hired an attorney to replace Edward Rager, the record in the foreclosure proceeding explicitly shows that Mrs. Rager did in fact make every effort to engage another attorney, but without success. Thus, she pleaded by letter, dated October 6, 1975, to Mr. Justice S. Thomas Pantano to withhold the signing of the Judgment of Foreclosure, which had been presented for the Court's signature on October 6, 1975, stating *inter alia*, "I have tried to get attorneys to help me *** they are afraid of the consequences. They are afraid what happened to us will happen to them *** they will be ruined."

The record of the foreclosure proceeding in Suffolk County further contained a rambling telegram addressed to Judge Pittoni on May 29, 1975, begging for additional time to answer, and stated that he "requested local attorney appear" (Appendix p. 47a).

Further, the record of the mortgage foreclosure proceeding instituted by Respondents against the Ragers in the Supreme Court, New York County, (Index No. 2166/75) shows that Petitioner Edwina Rager pleaded by letter to Hon. Thomas C. Chimera dated August 12, 1975, for an extension of time to get an attorney in opposition to the motion of Respondent Inland for summary judgment and for appointment of a referee in the foreclosure action.

On September 9, 1975, Mr. Justice Chimera granted Respondent's motion, stating, *inter alia,* as follows:

> "Defendant Edwina Rager has not served any formal notice of appearance in this action but on the adjourned date of this motion requested additional time to obtain new counsel for the corporate defendant in light of the disappearance of her husband-attorney Edward Rager, a co-defendant. This Court granted her until noon the following day to obtain counsel and submit opposing papers. (To this very day no papers of any significance have been submitted to this Court and no attorney has come forward in behalf of the corporate defendant). Several letters addressed to this Court were received requesting additional time to obtain counsel and detailing unrelated matters to this Court." (Appendix 61a-62a).

The affidavit of Petitioner Edwina Rager, dated April 19, 1978, filed in the Supreme Court, New York County (*Index 4252/76*), in opposition to Respondent's motion for summary judgment pertaining to the virtually identical action as at bar, fully confirmed the extraordinary efforts by both Edwina Rager and Edward Rager to engge another attorney, from the very inception of the foreclosure proceeding, and even commencing several months prior thereto, in November 1974, at a time that Edward Rager's mental condition suffered rapid deterioration.

In that affidavit, Petitioner Edwina Rager stated that she consulted at least twenty attorneys in New York, Nassau and Suffolk Counties, commencing November 1974 continuously up to September 1975. In addition, she sought the aid of at least 25 attorneys in Bergen County, New Jersey with respect to the Ragers' property under foreclosure, known as Floral Gardens, Inc. in New Jersey; further that "In December 1974, my husband and I went to the very influential Nickerson firm in Nassau County, but I was informed by an attorney in that firm that he thought my husband because of the terrible pressures on him had become sick and unless I consented to a commitment order, in view of his obvious utter state of illness, he would not represent me. I refused to permit this."

Further, she consulted the president of the Nassau Bar Association, Daniel Sullivan, Esq., and with the President of

the Suffolk County Bar Association. In July, August and September 1975, she sought legal assistance by applying to the Association of the Bar, but without success. (Aff. Edwina Rager, pp. 24-27 incl.)

The affidavit of Petitioner Edwina Rager further stated: "We were unable to pay any retainer whatever because we were left completely without income or assets by the fraudulent acts of these defendants. By stealing the deed from us to our New York property, we were prevented from borrowing any money thereon, whatsoever, by refinancing or otherwise, although we had a remaining equity there of approximately $175,000.00, above all mortgages as of December 6, 1974. Thus, the defendants succeeded in their objective of obtaining their fraudulent judgments of foreclosure by default as to both our New York and Suffolk properties." (Aff. p. 26)

Petitioners duly requested the Appellate Division below to take judicial notice of the virtually identical action instituted by Petitioners against the Respondents, in the Supreme Court, County of New York, under Index No. 4252/76. (Appendix,

The Appellate Division was clearly obliged to take judicial notice of the latter proceeding in view of the undeniable documented fact that the fraud perpetrated by the Respondents on December 6, 1974 directly related to both of Petitioners' properties of Flowervale, Inc. in Suffolk County and Inspiration Enterprises, Inc. in New York County, as conclusively appears in the letter-agreement dated Dec. 6, 1974 (Appendix 25a) The pleadings in both actions were word for word, substantially identical in each and every allegation.

Further, the courts below were absolutely required to take judicial notice of the New York action and all the proceedings therein, upon the following specific grounds:

(a) Respondents themselves specifically pleaded in their First Affirmative Defense to Petitioner's cause of action herein, as follows:

> "There is pending in Supreme Court, New York County, under Index 4252/76 another action in which some or all of the issues pertaining to the allegations of the complaint respecting the foreclosure of the property at 16 East 65th Street, are in litigation." (Appendix 29a)

(b) Respondents' own motion for summary judgment below, was expressly predicated upon contention that "the action here at bar and the New York action are identical in all respects," and that the one was *res judicata* of the other (Aff. Stern, par. 17, motion for summary judgment).

In *Richardson, Law of Evid., Sec. 652, 10th Ed.,* it is stated:

> "In New York it has been held that a court may take judicial notice of a record in the same court in another action. *Matter of Ordway,* 196 NY 95, 89 N.E. 474."

Finally, the petitioners' motion for reargument contended below that the Court overlooked the established legal principle that a judgment obtained by fraud may never be used as a basis for the application of *res judicata (Carmody-Wait 2d, Sec. 63:218, Kerr v. Blodgett,* Abb. Pr. 137, 25 How Pr 303, aff. 58 NY 62; *Hartford Acc. & Indem. Co. v. First Nat. Bank and Trust Co.* 281 NY 162; *Parker v. Hoffer,* 2 NY 2d 612; *Riehle v. Margolies,* 278 US 218, 225). (par. 25).

Additionally, the Court overlooked the binding legal principle that *res judicata* or collateral estoppel cannot be applied where the Petitioners as here, had been deprived of an opportunity to defend the mortgage foreclosure proceeding because of the totally disabling mental illness and incapacity of Petitioners' attorney. (*State Ins. Fund v. Low,* 3 NY 2d 590; *Schwartz v. Public Administrator,* 24 NY 2d 65, 71).

RESPONDENTS' ANSWERING AFFIRMATION

Respondents' answering affirmation, by their attorney, dated March 2, 1978, alleged *inter alia,* that "Mr. Nussbaum's papers are simply a repetition of the same tired allegations, without supporting proof of any kind, that were put before the Court on the original motion for summary judgment *** and in any event, has no application to the case at bar because it simply does not support the essential contention of the plaintiffs, namely that the judgment in the Suffolk County foreclosure was procured by fraud." (Abelson Aff., par. 7).

PETITIONERS' REPLY

In reply thereto, Petitioners' Affirmation by their attorney Aaron Nussbaum, Esq., dated March 8, 1978, set forth *inter alia* as follows:

"4. Turning to the merits of the Plaintiffs' motion for renewal and reargument of the order and decision granting summary judgment and dismissal of the complaint, your affirmant respectfully calls the Court's attention to the fact that the answering affirmation of Richard H. Abelson, Esq. utterly fails to deny, controvert or refute any of the salient and material facts set forth in the Plaintiffs' moving papers herein. Instead, Mr. Abelson cavalierly dismisses these triable issues of fact as a "repetition of the same tired allegations" (Aff. p. 5), without an iota of factual rebuttal offered or attempted in the defendants' behalf.

5. Particularly, the defendants have failed to dispute or deny that the letter-agreement of the defendant Inland Credit Corporation, attached to the amended complaint as *Ex. A,* constituting the crux of the fraudulent representations made by them to the Plaintiffs, was signed and initialled by the Defendants and delivered to the Plaintiffs at the time they executed

and delivered the deed to their New York property under the specific terms and conditions set forth in the letter-agreement *Ex. A.*

6. Further, the defendants have failed to dispute or deny any of the Plaintiffs' documented statements, set forth in the moving papers for renewal herein that the defendants did in fact admit, at their examinations before trial, that the letter-agreement *Ex. A* had been signed and delivered to the Plaintiffs. Though the *original* of the letter-agreement *Ex. A*, is in the possession of the Defendants, Mr. Abelson has failed to produce that letter in any attempt to contradict the Plaintiffs' allegations that the letter containing the penned insertions were signed and initialled by the defendants, as alleged in Par. 18 of the complaint, and then stolen by the defendants, as alleged in Par. 26 thereof.

7. Nor have the defendants in any way attempted, in their answering affidavit to the motion for renewal herein, to deny or contradict the documented proof elicited by the Plaintiffs at the examinations before trial, conclusively attesting to the bad faith lack of effort or intention of the defendants to sell the New York property upon the most advantageous terms in order to effectuate the terms of the letter-agreement *Ex. A,* so that the Plaintiffs would be in a position to save their Flowervale, Inc. business and property in Suffolk County in lieu of foreclosure.

8. Nor have the defendants even responded, in the answering affirmation of Richard H. Abelson, Esq. to the contention of the Plaintiffs that the principle of *res judicata* is, in any event, unavailable as a defense to a fraud action under the judicial precedents cited in par. 45, Aff. Aaron Nussbaum, Esq. herein; nor have they responded to the Plaintiffs' basic objection, likewise, that the principle of *res judicata* may not be invoked with respect to the Plaintiffs' second cause of action for compensatory and punitive damages, inasmuch as an independent action may be maintained thereon even where it could have

been interposed as a counterclaim in the prior mortgage foreclosure action (Par. 48 Aff. Aaron Nussbaum)."

Documented Proof of Petitioner Edward Rager's Mental Incapacity

The incapacitating mental illness of Edward Rager was documented on its very face by the Court records of judicial decisions, pleadings, affidavits, letters and telegrams submitted by Petitioners in both the mortgage foreclosure proceedings instituted by the Respondents against Petitioners in the Supreme Court, Suffolk County, as well as in the Supreme Court, New York County in connection with the virtually identical fraudulent foreclosure proceeding simultaneously instituted by Inland against Petitioner, based on the identical fraud perpetrated against the Petitioners as to both the Suffolk and New York properties (Amended Compl., pars. 27-28, *Ex. A*).

The record shows that in the very final moment that Edward Rager made a final, last-ditch effort in desperation to vacate his default, he filed a motion entitled "Most Urgent—Immediate Injunctive Relief Requested, etc." (Resp. *Ex. E*, Motion for summary judgment), and he piteously pleaded with the Court that private investors in Flowervale be protected, and urged these innocent victims of the Respondents' fraudulent acts "to go either to the Legal Aid Society or perhaps also to Civil Liberties or to some very prominent powerful persons who will not brook any political injustice and ask them to intervene in this *** action pending at present in this Court and also one against him in New York County." (Resp. *Ex. E*, Rager Aff. p. 2)

The completely demented and irrational behavior of Edward Rager is reflected as well in the Respondents' own motion for judgment in the foreclosure proceeding in Suffolk County (Index 75/1968). There, the attorney for the Respondents filed an affidavit stating that the Defendant Flowervale, Inc. had not served a Notice of Appearance in the foreclosure action, but

that Edward Rager, as its attorney, appeared therein "by making a motion in this action to remove this action in New York County and consolidate it with four other actions—two pending in Suffolk County, two pending in New York County—none of which had anything to do with each other. That motion was made returnable in New York County and was submitted to Mr. Justice Helman, dated April 21, 1975." (Aff. George Natanson, Esq., par. 12)

The Court below wholly disregarded the fact that Rager's mental incapacity to defend the foreclosure proceeding was attested by the personal observations of Petitioner Edwina Rager, his wife, as specifically alleged in pars. 22-22a of the amended verified complaint, and in her affidavit opposing summary judgment.

The settled rule is that a wife may testify as to the mental condition of her husband and give an opinion as to his sanity when accompanied by a statement of facts on which it is based. (*Haney v. Clark,* 65 Tex. 93; *Denning v. Butcher,* 91 Iowa 425, 55 N.W. 69)

It is hornbook law that proof of insanity or mental illness is admissible by non-expert witnesses, founded upon personal observation of the individual's conduct and appearance. (*Turner v. American Security & Trust Co.,* 213 U.S. 257; *DeWitt v. Barly,* 17 NY 2d 340 (1858); *Clapp v. Fullerton,* 34 NY 190, 194); *Holcomb v. Holcomb,* 95 NY 316; *People v. Hill,* 195 NY 16, 26; *People v. Pekarz,* 185 NY 470, 481; *Richardson Law of Evid.* Sec. 524 7th ed.)

In *Richardson, Law of Evid., sec. 193,* it is stated:

> "The mental capacity or incapacity of a person may be evidenced circumstantially (1) by his conduct and declarations; (2) by circumstances which affected him and which tend to produce a special mental condition; and (3) by his prior and subsequent condition. *Wigmore Evid. Sec. 227.*"

The affidavit of Petitioner Edwina Rager, in opposition to Respondents' motion for summary judgment in the identical New York action instituted by petitioner, set forth detailed facts

substantiating the allegations of the complaint that Respondents were fully aware that Edward Rager was "mentally incapable of handling his affairs, either in his individual capacity, or as attorney for the Plaintiffs Inspiration and Edwina Rager, and was then and there mentally incapacitated from protecting the legal and equitable rights belonging to the plaintiffs (par. 22); and further, that the Respondents fraudulently caused and precipitated, aggravated and compounded the mental illness, as follows:

> "That at all the times hereinafter mentioned, the said defendants fraudulently and covinously caused, precipitated, aggravated and compounded the mental illness of the plaintiff Edward Rager, as aforesaid, in order to prevent, thwart, frustrate and bar the said Edward Rager, both individually and as attorney for the plaintiffs Inspiration and Edwina Rager, from taking any legal action or counter-action against the defendants, or from interposing a proper defense or defenses on the merits to any foreclosure action or summary dispossess proceeding against the plaintiffs which the defendants, and each of them, then and there fraudulently contemplated taking against the plaintiffs herein, as aforesaid." (complaint, par. 22a)

The affidavit of Edwina Rager aforestated specifically stated, *inter alia,* that

> At the time the defendants fraudulently obtained the deed to our New York property, as aforestated, they well knew from personal discussions, conversations and negotiations with my husband, and with me, in each other's presence, in October and November of 1974, that Edward Rager was on the verge of a complete nervous and mental breakdown and that he was incapable of handling his affairs and representing the plaintiffs as their attorney in any litigation."

The affidavit of Edwina Rager further recited that on January 8, 1975, shortly after swindling the deed from the Ragers on December 6, 1974 under the fraudulent representations aforestated, Respondent Stern attempted to drive the Ragers from their home, profanely shouting at Edward Rager:

> "*You son-of-a-bitch, you nut, everybody and all the judges know that you are insane. Get out of here. Go to the gutter where you belong.*" (Aff. p. 21)

The affidavit further stated, at p. 12:

"Prior thereto, in August 1974, the defendant Stern said to me during the course of his repeated attempts to buy our properties of Flowervale, Rose Fair and Floral Gardens on his terms, that he preferred dealing with me, that '*I can't communicate with Dr. Rager; he's a sick man.*"

Subsequent thereto, on November 17, 1974, at Floral Gardens in New Jersey, the defendant Greenstein came with his wife and said to me that he had visited Dr. Rager in Blue Point, Suffolk County: '*He doesn't know what he's doing;* I am planning to leave Inland—let me handle your affairs for you; he's making a mess of things. He'll ruin you."

On December 6, 1974, the defendant Greenstein stated to me in his home on West End Avenue in Manhattan, while my husband remained in an adjoining room: '*Rager is a very sick man. He's rambling and incoherent—he doesn't know what he's talking about. Why don't you have him committed?* We'll help you but you must cooperate with me."

REASONS FOR GRANTING THE WRIT

The state court has decided a federal constitutional question of substance, namely, the right to due process of law and the opportunity to be heard upon the merits, by improperly granting summary judgment and dismissing Petitioners' causes of action, in violation of the statutory mandate and judicial precedents, and directly contrary to the applicable decisions of this court, thus depriving petitioners of their constitutional rights guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States.

I

The material, triable issues of fact documented in the record precluded the granting of summary judgment. *New York Civil Practice Law and Rule 3212(b),* specifically provides that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact."

In *Sullivan v. Twentieth Century Fox,* 3 NY 2d 405, 395, 404, the Court explicitly stated:

> "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*DiMenna & Sons v. City of NY,* 301 NY 118, 92 NE 2d 918). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 AD 1019, 116 NYS 2d 857, or where the issue is 'arguable' (Barrett v. Jacobs, 255 NY 520, 522, 175 N.E. 275); 'issue-finding, rather than issue-determination is the key to the procedure.' (*Esteve v. Abad,* 271 AD 725, 727).

In accord: *(Parmelee v. Chicago Eye Shield Co.,* 157 F.2d 582 (CA 8); *United States v. Bosurgi,* 530 F.2d (CA 2, N.Y.); *Gossett v. Du-Ra-Kel Corp.,* 569 F.2d 869 (CA 5, Ga.); *73 Am Jur 2d 723.*

It is universal law that summary judgment procedure should never be used as a vehicle for judicial fact-finding by means of a choice between opposing affidavits. (*New Jersey*

Mortg. & Invest. Corp. v. Calvetti, 68 N.J. Super 18, 171 A 2d 321; *Community Oil Co. v. Welch,* 105 NJ 320, 199 A 2d 107); *Diversey Liquidating Corp. v. Neunkirchen,* 370 Ill. 523; 19 N.E. 2d 363; *120 ALR 1395.*

Here, the Court disregarded the basic principle that the credibility of the parties is not to be weighed in a motion for summary judgment (*Glick-Dolleck, Inc. v. Tri-Pack Export Corp.,* 22 NY 2d 439). Further, that in such a motion, all inferences are to be drawn against the moving party. (*Patterson v. Proctor Paint & Varnish Co.,* 21 NY 2d 447; *U.S. v. Diebold Inc.,* 369 US 654).

In *Barrett v. Jacobs,* 255 NY 520, 175 N.E. 275 (1931), in a per curiam opinion joined by Cardozo, Ch. J., the Court held:

> "(Summary) judgment should not be granted unless it is clear that Plaintiff has made out a case on the undisputed material facts presented on the record by affidavit or other proof *** Respondents have an arguable defense on the record before us and should not be deprived of a trial."

In *Alvord & Swift v. Stewart M. Muller Const. Co., Inc.* ____NY 2d____ (December 31, 1978), the New York Court of Appeals stated:

> "Modern principles of procedure do not permit an unconditional grant of summary judgment against a plaintiff who, despite defects in pleading, has in his submission made out a cause of action."

The settled rule governing summary judgment procedure was succinctly laid down by the New York Court of Appeals in *Gen. Investment Co. Interborough R.T. Co.,* 235 NY 133, 139, wherein the Court unanimously stated:

> "A defendant may in all cases successfully oppose an application for summary judgment under the rule by satisfying the court by affidavit or otherwise that he has a real defense to the action and should be allowed to defend. In order that a plaintiff shall succeed on such a motion it must appear from the moving papers and answering affidavits that the defense or denial interposed is sham or

frivolous. If a defendant adduces facts upon the hearing of the application which constitute an apparent defense, he should be allowed to defend. Such is the law in England under a like rule of the Supreme Court of Judicature (English Practice Act, Annual Practice 1922, rule 3, page 13—Order 14, page 150—notes page 151 and following; Halsbury's Laws of England, volume 18, pages 190, 192, 194; *Wallingford v. Mutual Society,* 5 Law Reports, Appeal Cases, 1879-1880) and a conservative guide for adoption by our courts."

And, further, at pp. 142-3:

"The rule in question is simply one regulating and prescribing procedure, whereby the court may summarily determine whether or not a *bona fide* issue exists between the parties to the action. A determination by the court that such issue is presented requires the denial of an application for summary judgment and trial of the issue by jury at the election of either party. On the other hand, if the pleadings and affidavits of plaintiff disclose that no defense exists to the cause of action, and a defendant, as in the instant case, fails to controvert such evidence and establish by affidavit or proof that it has a real defense and should be permitted to defend, the court may determine that no issue triable by jury exists between the parties and grant a summary judgment."

II

The palpably erroneous decision by the Supreme Court of the State of New York, Special Term, Suffolk County (Underwood, J.) to the effect that "the doctrine of estoppel or res judicata under the facts of this case is applicable to the order of Justice Pittoni as though it were a final judgment" (Appendix 6a), completely disregarded the critical fact that Petitioner Edward Rager was totally incapacitated to represent Petitioners as their attorney throughout the mortgage foreclosure proceedings in Suffolk County and New York County, as conclusively documented by the judicial records fully available to the Court, and as to wh ich it had judicial notice.

It is only where the parties had a full and fair opportunity to contest the issues that the doctrines of collateral estoppel or res judicata can be fairly applied. *Postal Telegraph Cable Co. v. Newport,* 247 U.S., 464; *Schwartz v. Public Admr.,* 24 NY 2d 65, 71.

In *Schwartz v. Public Administrator,* 24 N.Y. 2d 65, 71, the Court of Appeals stated:

"New York Law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, *there must have been a full and fair opportunity to contest the decision now said to be controlling."* (emphasis ours)

In *Gramatan Home Investors Corp. v. Lopez,* 46 NY 2d 481 (1979), the Court of Appeals recently stated:

"One of the fundamental principles of our system of justice is that every person is entitled a day in court *** Considerations of due process prohibit personally binding a party by the results of an action in which that party has never been afforded an opportunity to be heard *(Postal Tel. Cable Co. v. Newport,* 247 U.S. 464, 476, 38 S. Ct. 566, 62 L. Ed. 1215)."

Accord: *Weinstein-Korn-Miller, NY Civil Practice, Sec. 3126.13* "Constitutional Limits on Dismissal."

III

The Court plainly erred, as a matter of law, in holding that:

> "Whether the alleged fraud committed by defendants is labelled intrinsic or extrinsic (see 5 Weinstein-Korn-Miller N.Y. Civ. Prac. par. 5015.09), plaintiffs have failed to establish by sufficient proof that there is an issue to be tried." (Appendix 6a).

A

As aforenoted, the complaint in the causes of action at issue herein is virtually identical with the complaint filed by Petitioners against Respondents in the Supreme Court of the State of New York, County of New York.

The sufficiency of the latter complaint was recognized by the latter court of coordinate jurisdiction when on May 5, 1976, Special Term, Supreme Court, New York County, after due deliberation, granted an order *pendente lite,* restraining and enjoining the Respondents from transferring or otherwise disposing of the New York property pending trial. The Respondents did not appeal from that decision.

The settled rule in the State of New York is that a preliminary injunction may be issued only as to a valid cause of action, showing a reasonable probability of success.

In *Guglgenheimer v. Ginzberg,* 43 NY 2d 268, the Court stated:

> "***** *a motion for a temporary injunction opens the record and gives the court authority to pass upon the sufficiency of the underlying pleading.*"

B

CPLR 5015, subd. 3 provides that a judgment may be set aside for "fraud, misrepresentation, or other misconduct by an adverse party."

In *New York Practice, by Prof. Siegel,* p. 570, it is noted:

> "The Advisory Committee intended the 'fraud' of paragraph 3 to have broad meaning, citing *Ladd v. Stevenson,* 112 NY 325, a major New York case on the power of a court to vacate its judgments in the interests of justice."

Though a judgment of a court is not generally open to collateral attack, this general rule is subject to one well recognized exception, that a judgment may be attacked collaterally if there was actual fraud practiced in securing the judgment (*Mayor of City of New York v. Brady,* 115 NY, 599, 614-615); *Ward v. Town of Southfield,* 102 NY 387; *Crouse v. McVickar,* 207 NY 213, 218, *Fuhrmann v. Fanroth,* 254 NY 479.

In *Fuhrmann v. Fanroth, supra,* Mr. Justice Cardozo, speaking for the New York Court of Appeals, articulated the cardinal rule:

> "The plaintiff, to prevail, must prove that there was fraud in the very means by which the judgment was procured (*Mayor, etc. of City of New York v. Brady,* 115 NY 599; *Ward v. Town of Southfield,* 102 NY 287, 292; *Crouse v. McVickar,* 207 NY 213, 218, 219 45 LRA (N.S.) 1159; *U.S. v. Throckmorton,* 98 US 61, 68 (25 LED 224, some covinous device, for illustration, *where she was robbed of the opportunity to uncover her grievance and expose it to the Court.*" (italics ours)

In *Ward v. Town of Southfield,* 102 N.Y. 287, at pp. 293-3, the Court of Appeals stated:

> "**** where there was fraud, not in the subject of the litigation, not in anything which was involved in the issues tried, but fraud practiced upon a party or upon the Court during the trial or in prosecuting the action, or in obtaining the

judgment, then in a proper case the judgment may be attacked collaterally, and on account thereof, set aside and vacated."

Applying these equitable principles to the extraordinary factual situation at bar, petitioners were indeed robbed of the opportunity to defend the mortgage foreclosure proceedings by the calculated machinations of Respondents to incapacitate the mentally ill Edward Rager as Petitioners' attorney and thus cause inevitable default and ensuing judgment of foreclosure against the Petitioner.

The succession of cruel blows inflicted upon Petitioners by these Respondents, literally yanking the rug out from under them, could not but have led any normal being to the very brink of suicide, cerebral helplessness or total insanity.

Particularly apt here is *People v. Wood,* 126 NY 249, wherein the Court stated:

"Any material fact which might account for or naturally lead to insanity at that moment may be proved. *Why should not the defendant have the right to prove a moral cause which might act upon a brain already diseased and might result in insanity as naturally as blows upon the head?"*

Seldom in the annals of civil jurisprudence has a case been more permeated with unconscionable fraud, venality and greed than in the case at bar. All in one swoop, the Respondents swindled Petitioners of their deed to 16 East 65th Street, New York, stole the letter-agreement, *Ex. A,* fraudulently foreclosed their properties valued at $1,475,000.00, physically and mentally coerced and threatened them into forced abandonment of their home and law offices by cutting off all heating, lighting and maintenance, and threatened to throw Petitioner Edward Rager "into the gutter" from a home he owned since 1957. By these violent strikes against Petitioners, all ongoing negotiations for refinancing of the valuable properties of Flowervale and 16 East 65th Street, New York, were completely undermined. In addition, the very misappropriation of Petitioners' deed of ownership to 16 East 65th Street, New York, triggered the im-

mediate collapse of all pending negotiations for the refinancing of petitioners' other valuable properties, The Rose Fair, Inc., in Suffolk County, worth approximately $3,000,000.00, and Floral Gardens, Inc., in Bergen County, New Jersey, which had been formally appraised in March 1975 in the sum of $1.100,000.

The Respondents' fraudulent objective was to incapacitate Edward Rager and thus procure the judgments of foreclosure by default, and steal petitioners' properties thereby. As the record shows, their objectives were successful in the fullest measure.

The Respondents' calculated design to undermine and incapacitate the mentally ailing Edward Rager took its toll on June 25, 1975, when he suddenly disappeared and fled in panicky refuge to Canada, barely two days after frantically addressing an irrational "motion" to the Supreme Court, Suffolk County, returnable July 1, 1975, in a final desperate attempt to stave off the judgment of foreclosure by default (Resp. *Ex. E,* motion for summary judgment(48a-51a).

It is no mere coincidence that the corporation, Plantation House and Garden Products, Inc., the wholly-owned and controlled subsidiary of Inland, had been organized in Delaware in *1972,* as a flower growing and retailing corporation, barely several months after Inland made its second mortgage loan to the Appellants, now yielding a net income to Respondents of approximately $140,000. a year (pars. 8-12, Amended Complaint).

The unconscionable fraud perpetrated against Petitioners, culminating inevitably in the judgments of mortgage foreclosure by default against them, both in Suffolk County anad New York County, was doubly compounded by the Respondents' brazen fraud upon the Courts as well.

The record shows that Respondents fraudulently suppressed and concealed from the Court, in the mortgage foreclosure proceeding at issue, (a) the crucial written agreement admittedly signed by Defendants on December 6, 1974, not to foreclose *either* 16 East 65th Street, New York, or Flowervale, Inc. (Ex.

A, Amended Complaint); and (b) by the mortgage extension agreement dated November 27, 1974, signed by Respondent Inland, expressly agreeing not to foreclose Flowervale, and extending the mortgage to August 31, 1975 (*Ex. B,* Amended Complaint).

The Respondents' fraud against the Court was duplicated, likewise, in the companion mortgage foreclosure proceeding it instituted against Petitioners in the Supreme Court, New York County, with respect to the 16 East 65th Street property. There, too, the Respondents fraudulently suppressed and concealed from the foreclosure court that on December 6, 1974 they had acquired the deed to 16 East 65th Street, the premises under foreclosure, through its wholly-owned and controlled subsidiary, Ardisco Financial Corporation.*

IV

The court below disregarded the basic principle that a judgment obtained by fraud may not, in any event, be used as a basis for the application of res judicata.

Under the judicial precedents, a judgment obtained by fraud may never be used as a basis for the application of *res judicata (Kerr v. Glodgett,* Abb. Pr. 137, 25 How Pr 303, Aff. 48 NY 62; *Hartford Acc. & Indem. Co. v. First Nat. Bank and Trust Co.* 281 NY 162; *Parker v. Hoffer,* 2 NY 2d 612; *Riehle v. Margolies,* 278 US 218, 225; *Carmody-Wait* 2d, Sec. 63:217, 218).

In *Parker v. Hoffer,* 2 NY 2d 613, the Court of Appeals definitively stated:

* See companion Petition for Writ of Certiorari, pp. 14-15, now pending before the Court. (*Inspiration Enterprises, Inc., Edwina Rager and Edward Rager, v. Inland Credit Corp., et al.,* Docket No. 79-300).

> "*** a judgment of a Court having jurisdiction of the parties and of the subject matter operates as res judicata *in the absence of fraud or collusion,* even if obtained by default *(Riehle v. Margolies,* 279 US 218,225)." (emphasis ours)

Accord: *Loeb v. Willis,* 100 NY 231, *Potter v. Ogden,* 136 NY 384; *Reed v. Chilson,* 142 NY 152; *White Plains v. Hadermann,* 272 App. Div. 507, affd. 297 NY 623; *Goldman v. Business Factors Corp.* 20 AD 2d 764 (1st Dept.).

The New York Court of Appeals has held that the doctrines of collateral estoppel and res judicata should not be applied in any case when it would result in manifest injustice, and "must not be allowed to operate to deprive a party of an actual opportunity to be heard." (*State Ins. Fund v. Low,* 3 NY 2d 590)

In *Young v. Regan,* 337 U.S. 236, the Court stated:

> "More than a question of state procedure is involved when a state court of last resort closes the door to any question of a claim of denial of a federal right."

V

By the same standards, in granting summary judgment in dismissing Petitioners' second cause of action for compensatory and punitive damages grounded in fraud, the state court below likewise completely disregarded the documented allegations of fraud, creating triable issues of fact, which precluded the grant of summary judgment, under the judicial precedents.

Petitioners have duly pleaded the essential elements of fraudulent representation, intention to defraud, reliance, scienter and damages, within the established judicial precedents. (*Hanlon v. MacFadden,* 302 NY 502; *Channel Master Corp. v. Aluminum Limited Sales, Inc.,* 4 NY 2d 403); *Hotchkin v. Third Nat. Bank,* 127 N.Y. 329, 27 N.E. 1050); *Arthur v. Griswold,* 55 N.Y. 400; *Shafly v. U.S.,* 4 F.2d 195).

A motion for dismissal of a complaint should be denied unless there is no rational process by which a jury could find for the plaintiffs. (*Blum v. Fresh Grown Preserve Corp.*, 299 NY 241).

Further, in misapplying the principle of *res judicata* at bar, particularly with regard to the second cause of action for compensatory and punitive damages, the Court below totally disregarded the settled judicial precedents that where a counterclaim for money damages may be interposed in the prior action, but is not, a separate distinct action may nevertheless be subsequently brought thereon. (*Brown v. Gallaudet*, 80 NY 413; *De Graaf v. Eyckoff*, 118 NY 1; *Rosenberg v. Slotchin*, 181 AD 137, *Robinson v. Whitaker*, 205 AD 286, *Newgent v. Alberg*, 173 AD 878; *Meyerhoff v. Baker*, 121 AD 797).

In *Carmody-Wait, 2d, Sec. 63:210, New York Civil Practice*, it is stated:

> "A defendant having a claim available by way of setoff, counterclaim, or cross petition has an election so to plead it, or to reserve it for a future independent action, and a prior action in which a claim might have been asserted as a setoff, counterclaim or cross petition is not a bar to a subsequent independent action thereon, notwithstanding that the counterclaim arises out of the identical transactions on which the plaintiff's action was based in the first suit."

VI

In sum, the decision of the Court below rested on no adequate state ground. Here, the granting of summary judgment was totally "without any fair or substantial support" whatever, and was clearly contrary to the judicial precedents. (*Ward v. Love County*, 253 US 17 (1910). In *Ward*, the Court stated:

> "It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting

forward non-federal grounds of decision that were without any fair or substantial support. *Union Pacific R. R. Co. v. Public Service Commission*, 248 U.S. 67; *Leathe v. Thomas*, 207 U.S. 93, 99; *Vandalia R.R. Co. v. South Bend, ibid.* 359, 367; *Gaar, Scott & Co. v. Shannon*, 223 U.S. 468; *Creswill v. Knights of Pythias*, 225 U.S. 246, 261; *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164. And see *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 443; *Huntington v. Attrill*, 146 U.S. 657, 683-684; *Boyd v. Thayer*, 143 U.S. 135, 180; *Carter v. Texas*, 177 U.S. 442, 447. Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. *Terre Haute & Indianapolis R. R. Co. v. Indiana*, 194 U.S. 579, 589. With this qualification, it is true that a judgment of a state court, which is put on independent non-federal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material one and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof."

In *Henry v. Mississippi*, 379 US 443, the Court stated:

> "*** we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question. Cf. *Lovell, v. City of Griffin*, 303 U.S. 444, 450. As Mr. Justice Holmes said:
>
> > "When as here there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail . . . . Whether the right was denied or given due recognition by the [state court] . . . is a question as to which the plaintiffs are entitled to invoke our judgment." *Love v. Griffith*, 266 U.S. 32, 33-34."
>
> Only last Term, we reaffirmed this principle, holding that a state appellate court's refusal, on the ground of mootness, to consider a federal claim, did not preclude our independent determination of the question of mootness; that is itself a question of federal law which this Court must

ultimately decide. *Liner v. Jafco, Inc.*, 375 U.S. 301. These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest."

In *Amer. Ry. Exp. Co. v. Levee,* 263 US 19, the Court held:

"If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill v. Grand Lodge Knights of Pythias,* 225 U.S. 246."

In *Hurtado v. California,* 110 U.S. 516 (1884), the Court noted that the due process clause of the Constitution extends to "all the powers of government, legislative as well as executive and judicial." There, the Court noted that:

"*** arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions."

In *Societe Internationale v. Rogers,* 357 US 197, the Court stated:

"*** there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."

In *Fuentes v. Shevin,* 407 U.S. 657, at p. 80, the Court stated:

"The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. See *Lynch v. Household Finance Corp.,* 405 U.S. 538, 552."

In *Hovey v. Elliott,* 167 U.S. 409, the Court stated:

" 'In Galpin v. Page, 18 Wall. 350, the court said: (p. 365)

It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial usurpation and oppression, and can never be upheld where justice is justly administered.'

Again, *in Ex parte Wall,* 107 U.S. 265, 289, the court quoted with approval the observations as to 'due process of law' made by Judge Cooley, in his Constitutional Limitations, at page 353, where he says:

'Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders

judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.' "

The federal questions presented herein were duly raised in the New York Court of Appeals, which denied Petitioners' leave to appeal without opinion (Appendix 12a), and were implicitly presented and considered below by the Supreme Court of the State of New York Appellate Division, Second Judicial Department.

The scope of review by the Appellate Division, First Judicial Department, below encompassed all questions of law and of fact. (*New York Civil Practice Law and Rule 5501(c),* pursuant to the authorization contained in *New York State Constitution Article 6, Sections 4k and 5.*

The order of the Supreme Court, Special Term, Suffolk County denying reargument was properly reviewable together with the final judgment. *(Royal Business Funds Corp. v. Commercial Trading Co., Inc.,* 59 App. Div. 2d 864, 401 NYS 2nd 691; *Jaffee v. McGoldrick,* 285 App. Div. 889, 137 NYS 2d 519).

CONCLUSION

Wherefore, it is prayed that a writ of certiorari issue to review the order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, as set forth herein.

Respectfully submitted,

AARON NUSSBAUM
Attorney for Petitioners
16 Court Street
Brooklyn, New York 11241

October 2nd, 1979

ORDER ON MOTION TO APPEAL TO THE COURT OF APPEALS

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 26, 1979.

HON. VINCENT D. DAMIANI, Justice Presiding
HON. FRANK D. O'CONNOR
HON. LEON D. LAZER
HON. FRANK A. GULOTTA, Associate Justices

FLOWERVALE, INC. ET AL.,

Appellants,

-against-

INLAND CREDIT CORPORATION ET AL.,

Respondents.

In the above entitled cause, the above named appellants having moved for leave to appeal to the Court of Appeals from an order of this court, dated April 2, 1979, which affirmed an order of the Supreme Court, Suffolk County, entered January 13, 1978 and dismissed the appeal from the order dated May 11, 1978,

Now, upon the papers filed in support of said motion and the papers filed in opposition thereto; upon the papers on which the appeal was determined; and the motion having been duly submitted and due deliberation having been had thereon, it is:

ORDERED that the motion is hereby denied.

Enter:

s/Irving N. Selkin
Clerk of the Appellate Division

Motion by appellants for leave to appeal to the Court of Appeals from an order of this court dated April 2, 1979, which affirmed an order of the Supreme Court, Suffolk County, entered January 13, 1978 and dismissed the appeal from the order dated May 11, 1978.

Motion denied.

DAMIANI, J.P., O'CONNOR, LAZER and GULOTTA, JJ., concur.

OPINION BELOW

SUPREME COURT, SUFFOLK COUNTY

FLOWERVALE, INC., EDWINA RAGER AND EDWARD RAGER,

Plaintiffs-Appellants,

-against-

INLAND CREDIT CORPORATION, PLANTATION HOUSE & GARDEN PRODS. INC., STANLEY E. STERN, OSCAR DANE AND HAROLD GREENSTEIN,

Defendants-Respondents.

SPECIAL TERM PART I
UNDERWOOD, JR., J.S.C.
December 1, 1977

DREYER & TRAUB
Attorneys for Defendants
90 Park Avenue
New York, N.Y. 10016

AARON NUSSBAUM, ESQ.
Attorney for Plaintiffs
16 Court Street
Brooklyn, New York 11241

Defendant Inland Credit Corporation (hereinafter referred to as Inland) held a subordinate mortgage on property located

in Bayport, Suffolk County which was owned by Flowervale, Inc. (hereinafter referred to as Flowervale). Inland commenced a foreclosure action and Flowervale defaulted in answering. The property was then sold at a public auction to Inland. Inland received a referee's deed dated January 28, 1976, and it subsequently sold the property to a co-defdendant Plantation House and Garden Products, Inc., the present owner of the property.

To use plaintiffs' analysis of their complaint " . . . the salient allegations of the complaint centering around Exhibit A which spell out the essential elements of fraud in the procurement of the judgment of foreclosure by default. *Exhibit A* is a letter dated December 4, 1974 from Inland to plaintiff Edwina Rager, and the typed portion of the letter states *inter alia* "you will sign a deed to the above property in lieu of foreclosure." The property mentioned in the agreement-letter was property located in New York County and not the Suffolk County property owned by Flowervale. Plaintiffs signed a deed to the New York County property. A foreclosure action was also commenced against the New York County property.

Plaintiff Edward Rager states that he was " . . . seriously ill emotionally, mentally and physically . . . and was then and there mentally incapable of handling or managing his affairs, either in his individual capacity, or as attorney for the plaintiffs . . . and was then and there mentally incapacitated from protecting the legal and equitable rights belonging to the plaintiffs."

Plaintiffs further state that the "fraudulent object and intent of the defendants was to acquire all of the plaintiffs' right, title and interest in and to the New York, as well as the Suffolk properties, at a fractional part of their actual worth or market value . . . and further, effectively deprived and wrongfully prevented the plaintiffs from effecting a sale of the premises upon the most advantageous terms pursuant to the terms thereof." General allegataions of defendants' fraudulent acts to deceive and defraud the plaintiffs are mentioned.

The court determines, after careful review of the complaint, the detailed affidavits and exhibits, that defendants' motion for summary judgment should be granted because there are no issues that warrant a trial.

Plaintiffs state that the complaint alleges "fraud in procurement of the judgment of foreclosure by default." Flowervale was duly served with the summons and complaint in the foreclosure action, and it defaulted in answering. Plaintiffs were also notified of every stage of the foreclosure proceedings and could have protected their equity in the property. Plaintiffs' reply, as previously noted, that because of plaintiff Edward Rager's condition, he could not defend the foreclosure action. Plaintiffs do not submit medical reports or other documentary evidence to establish Edward Rager's condition, which is required under the facts of this case, to successfully oppose a motion for summary judgment. Furthermore, although Rager is an attorney, he could have hired another attorney to represent plaintiffs. Additionally, his wife, plaintiff Edwina Rager, who was not incapacitated, could have hired another attorney.

Plaintiffs also contend that the agreement-letter specifically states that defendants would not foreclose if plaintiffs gave a deed to certain property to defendants. The "property" mentioned is the New York County property and not the Suffolk County property. Plaintiffs further allege that "the pen insertions by Mr. Rager stipulated that . . . there was to be no default declared as to the Flowervale property unless Suburban (Bank) grants no extension and intends to foreclose." Plaintiffs allege that Suburban did not foreclose.

The court cannot read the language added to the agreement from the copy submitted to it. Furthermore, plaintiff Edward Rager admits that he "penned" in the additions. Plaintiffs cannot show that defendants ever agreed to this insertion. Certainly, plaintiff Edward Rager, an attorney, who owned substantial real property, knew that his "penned" insertions, without more, did not constitute a valid and binding contract.

Plaintiffs next contend that the Appellate Division, First Department has "implicitly upheld" the "sufficiency of the within cause of action . . . " (see: *Inspiration Enterprises, Inc. v. Inland Credit Corporation* 54 AD 2d 839 leave to appeal

granted 55 AD 2d 527 appeal dismissed 40 NY2d 1014, 41 NY2d 901). This is not so. The court ruled on the propriety of an order which denied a motion to remove and consolidate, and an order which denied a motion for a *pendente lite* injunction. The court did not rule on the question of the sufficiency of the complaint because there was no order addressed to the sufficiency of the complaint before the court. The court would not *sua sponte* decide this question.

Plaintiffs are faced with another obstacle. They moved to vacate their default in the foreclosure action, which they could do. (see e.g. *Mills v. Nedza* 222 App. Div. 615), and their motion was denied. Justice Pittoni, on September 3, 1975 stated *inter alia,* "the moving affidavit in support of this motion fails to set forth facts indicating a reasonable excuse for the default, nor does it present a factual basis for a meritorious defense." Plaintiffs did not appeal Justice Pittoni's decision. The complaint in this action is very similar to the defenses contained in plaintiffs' proposed answer annexed to their affidavit in support of their motion to vacate, which Justice Pittoni held did not present a "meritorious defense."

The doctrine of estoppel or res judicata under the facts of this case is applicable to the order of Justice Pittoni as though it were a final judgment. (see e.g. *American Equitable Corp., v. Parkhill* 252 App. Div. 260; cf. *Weissberger v. Weissberger,* 266 App. Div. 973; *Baronowitz v. Baronowitz* 13 Misc. 2d 404).

Whether the alleged fraud committed by defendants is labelled intrinsic or extrinsic (see *5 Weinstein-Korn-Miller N. Y. Civ. Prac. par. 5015.09*), plaintiffs have failed to establish by sufficient proof that there is an issue to be tried. (cf *Priester v. Sigmond* 48 AD2d988).

Summary judgment has been recently utilized even in negligence cases when there is no issue to be tried (*Andre v. Pomeroy 35 NY2d 361*) and, to borrow a phrase from that case, this case is " . . . ripe for summary judgment." (*Id at 365*)

Settle judgment.

ORDER DATED MAY 11, 1978

SUPREME COURT STATE OF NEW YORK
TRIAL/SPECIAL TERM PART I—SUFFOLK COUNTY

Present: Hon. WILLIAM L. UNDERWOOD, JR.
Justice

FLOWERVALE, INC., EDWINA RAGER and EDWARD RAGER, 16 E. 65th St. NYC

Plaintiff-Appellants.

-against-

INLAND CREDIT CORP., PLANTATION HOUSE & GARDEN PRODUCTS, INC., STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN, with a principal place of business at 685 Fifth Ave., NYS.

Defendants-Respondents.

Upon the following papers numbered 1 to 10 read on this motion to vacate order. Notice of Motion/Order to Show Cause and supporting papers 1-4; Notice of Cross Motion and supporting papers 5-8; Answering Affidavits and supporting papers 9-10; it is,

ORDERED that this motion by plaintiffs to vacate an order and judgment dated December 30, 1977 and to grant this motion for renewal based upon new and additional facts is denied.

Dated May 11, 1978

s/
William L. Underwood, Jr., J.S.C.

ORDER AND JUDGMENT

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of Suffolk, at the Courthouse, Griffing Avenue, Riverhead, New York, on the 30th day of December, 1977.

PRESENT:
HON. WILLIAM J. UNDERWOOD, JR.
Justice.

FLOWERVALE, INC., EDWINA RAGER and EDWARD RAGER, 16 East 65th Street, New York, New York

Plaintiffs-Appellants,

-against-

INLAND CREDIT CORPORATION, PLANTATION HOUSE & GARDEN PRODUCTS, INC., STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN, with a principal place of business at 685 Fifth Avenue, New York.

Defendants-Respondents.

UPON the reading and filing of the summons and amended complaint, duly verified on April 13, 1976, the amended answer of the defendants herein, duly verified on July 19, 1976, the notice of motion dated June 8, 1977, whereby defendants moved this Court for summary judgment, pursuant to CPLR 3212; the affidavit of Stanley E. Stern, duly sworn to on May 31, 1977, together with Exhibits attached thereto, and the affidavit of Richard H. Abelson, duly sworn to on August 17, 1977, all

submitted in support of the said motion; and upon the affidavit of Edwina Rager, duly sworn to on July 1, 1977, together with Exhibits attached thereto and the affirmation of Aaron Nussbaum, Esq., dated September 29, 1977, all submitted in opposition to the motion; and the motion having come on to be heard and Dreyer and Traub, by Richard H. Abelson, having appeared in support of the said motion and Aaron Nussbaum, Esq., and Joseph M. Meehan, Esq., having appeared in opposition thereto, and after due deliberation, the Court having rendered its written decision on December 1, 1977, whereby it was determined that there are no issues in this matter which would warrant a trial;

NOW, on motion of Dreyer and Traub, the attorneys for defendants herein, it is hereby

ORDERED, ADJUDGED AND DECREED that defendants be and they hereby are, granted summary judgment, dismissing the two causes of action stated in the complaint; and it is further

ORDERED, ADJUDGED AND DECREED, that defendants are entitled to have final judgment herein against plaintiffs for the sum of $25.00 as taxed by the Clerk of this Court and hereby adjudged to the defendants for their costs and disbursements in this action with interest on that amount from the date of this judgment and that defendants shall have execution therefor.

ENTER
s/William L. Underwood
J.S.C.

Filed January 13, 1978

ORDER ON APPEAL FROM ORDERS

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 2, 1979

HON. VINCENT D. DAMIANI, Justice Presiding
HON. FRANK D. O'CONNOR
HON. LEON D. LAZER
HON. FRANK A. GULOTTA, Associate Justices

FLOWERVALE, INC., ET AL.,

Appellants,

-against-

INLAND CREDIT CORPORATION ET AL.,

Respondents.

In the above entitled cause, *inter alia,* to set aside a judgment of foreclosure, the above named Flowervale, Inc., et al., plaintiffs, having appealed to this court from (1) an order of the Supreme Court, Suffolk County, entered January 13, 1978, which granted summary judgment in favor of the defendants, and (2) a further order of the same court, dated May 11, 1978, which denied their motion, *inter alia,* for "renewal" and reargument (this court deems the motion to have been solely for reargument); and the said appeals having been argued by Aaron Nussbaum, Esq., of counsel for the appellant, and argued by Richard H. Abelson, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is;

ORDERED that the order dated May 11, 1978 appealed from is hereby dismissed, and it is further

ORDERED that the order entered January 13, 1978 is hereby unanimously affirmed, on the opinion of Mr. Justice UNDERWOOD at Special Term, dated December 1, 1977, and it is further

ORDERED that the defendants are awarded one bill of $50 costs and disbursements.

Enter:
s/Irving N. Selkin
Clerk of the Appellate Division

ORDER DATED JULY 10, 1979

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the tenth day of July, A.D. 1979

Present:
HON. LAWRENCE H. COOKE, Chief Judge, presiding.

FLOWERVALE, INC., EDWINA RAGER and EDWARD RAGER,

Appellants,

-against-

INLAND CREDIT CORPORATION, et al.,

Respondents.

A motion for leave to appeal etc., to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

AMENDED VERIFIED COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

FLOWERVALE, INC., EDWINA RAGER and EDWARD RAGER,

Plaintiffs,

-against-

INLAND CREDIT CORPORATION, PLANTATION HOUSE & GARDEN PRODUCTS, INC., STANLEY E. STERN, OSCAR DANE, and HAROLD GREENSTEIN,

Defendants.

The plaintiffs, complaining of the defendants, by AARON NUSSBAUM, ESQ., their attorney, respectfully show to this Court and allege as follows:

FOR A FIRST CAUSE OF ACTION

1. The plaintiff FLOWERVALE, INC., (hereinafter called FLOWERVALE) is a corporation duly organized under the laws of the State of New York and maintains its principal office at Sixteen East Sixty-fifth Street, New York, New York.

2. Heretofore, and for many years past and at all times hereinafter mentioned, the plaintiff FLOWERVALE was the owner in fee simple of the real estate, land, premises described as follows:

PARCEL I

ALL that tract or parcel of land, situate at Bayport, Town of Islip, Suffolk County, New York, bounded and described as follows:

BEGINNING at the center of a marble monument situated at the intersection of the southern line or side of Park Avenue or Church Street and the westerly line or side of the Town Road or Edendale Avenue; and

RUNNING THENCE (1st) along the westerly side of the Town Road or Edendale Avenue, South 9 degrees 43 minutes 10 seconds West 418.40 feet to the center of a marble monument;

RUNNING THENCE (2nd) North 81 degrees 27 minutes 50 seconds West 658.64 feet to the center of a marble monument situated in the center of what is called Central Avenue;

RUNNING THENCE (3rd) along the cxenter line of what is called Central Avenue North 10 degrees 00 minutes 00 seconds East 424.63 feet to the center of a concrete monument set in the southerly line or side of Park Avenue or Church Street;

RUNNING THENCE (4th) along the southerly side of Park Avenue or Church Street, South 80 degrees 55 minutes 30 seconds East 656.46 feet to the center of a marble monument and point or place of BEGINNING.

PARCEL II

ALL that certain plot, piece or parcel of land, situate, lying and being at Bayport, Town of Islip, County of Suffolk, being particularly bounded and described as follows:

BEGINNING at a locust stake set in the southerly line of Park Avenue (Church Street) distant 360 feet Easterly from the corner formed by the intersection of the Southerly side of Park Avenue with the Easterly side of Sylvan Avenue;

THENCE South 80 degrees 55 minutes 30 seconds East along the Southerly side of Park Avenue, 380 feet to a concrete monument and land of FLOWERVALE, INC.,

THENCE South 10 minutes West along Westerly line of land of Flowervale Inc., 290.44 feet to a locust stake;

THENCE North 80 degrees 55 minutes 30 seconds West along other land of Ernest Mittelholzer, 300 feet to a locust stake;

THENCE North 10 degrees East, still along other land of Ernest Mittelholzer, 290.44 feet to the point or place of BEGINNING.

3. At all times hereinafter mentioned, FLOWERVALE consisted of approximately seven and one half acres of land, located in Bayport, Islip Township, Suffolk County, State of New York, of the market value and reasonable worth of approximately Five Hundred Thousand ($500,000.00) Dollars, and further consisted of various buildings, residences and greenhouses containing about 50,000 square feet of glass of the fair market value and reasonable worth, together with the good will thereon, of the approximate sum of Five Hundred Thousand ($500,000.00) Dollars, for a total fair and reasonable value and worth of FLOWERVALE in the approximate sum of One Million ($1,000,000.00) Dollars.

4. At all the times hereinafter mentioned, the plaintiff EDWINA RAGER was the president of FLOWERVALE, and the plaintiff EDWARD RAGER was the secretary thereof, and the said plaintiffs were and are the sole owners and officers and stockholders of FLOWERVALE.

5. At all the times hereinafter mentioned, the plaintiffs EDWINA RAGER and EDWARD RAGER were also the sole stockholders and owners of INSPIRATION ENTERPRISES, INC. (hereinafter called INSPIRATION); that INSPIRATION was the owner in fee simple of the real estate, land and premises known as 16 East 65th Street, New York, New York, Borough of Manhattan, County of New York.

6. That the fair market value and reasonable worth of the real property and premises belonging to INSPIRATION, as

aforestated, was and is in the approximate sum of $450,000.00.

7. At all the times hereinafter mentioned, upon information and belief, the defendant INLAND CREDIT CORPORATION (hereinafter called INLAND CREDIT) is a corporation organized under the Laws of the State of New York, engaged in the principal business of second mortgage financing of real property.

8. At all the times hereinafter mentioned, upon information and belief, the defendant PLANTATION HOUSE & GARDEN PRODUCTS, INC. (hereinafter called PLANTATION) is a corporation organized under the Laws of the State of Delaware incorporated in 1972, doing business in the State of New York, and is a wholly owned subsidiary corporation of the defendant INLAND CREDIT.

9. Upon information and belief, at all the times hereinafter mentioned, the defendants INLAND CREDIT and its subsidiary PLANTATION were wholly owned, managed and controlled by the defendants STANLEY E. STERN (hereinafter called STERN) and OSCAR DANE (hereinafter called DANE), and the said defendants STERN and DANE were at all times mentioned herein the sole stockholders of each of the defendant corporations aforesaid.

10. Upon information and belief, at all times hereinafter mentioned, the defendant STERN was the president of the defendant corporations INLAND CREDIT and PLANTATION.

11. Upon information and belief, at all the times hereinafter mentioned, the defendant DANE was an executive officer and the Chairman of the Board of Directors of the said defendant corporations INLAND CREDIT and PLANTATION.

12. Upon information and belief, at all the times hereinafter mentioned, the defendant HAROLD GREENSTEIN (hereinafter called GREENSTEIN) was the Executive Vice-President of the defendant corporations INLAND CREDIT and PLANTATION.

13. That heretofore, and on May 2, 1972, the defendant INLAND CREDIT issued a second mortgage loan in the sum of $55,000., which mortgage loan was consolidated on said date with another prior lien upon said property into a single second lien in the sum of $100,000.00.

14. That heretofore, and on May 2, 1972, the defendant INLAND CREDIT also issued a second mortgage loan to the plaintiff INSPIRATION covering the INSPIRATION property at 16 East 65th Street, New York, New York, on a consolidated mortgage, in the amount of $160,000.00, subject to a reduced first mortgage lien thereon in the original amount of approximately $140,000.00

15. That heretofore, in or about November 1974, and at all times mentioned herein, the fair and reasonable value and worth of the equity belonging to the plaintiff INSPIRATION in and to its real property situated at 16 East 65th Street, Borough of Manhattan, City and State of New York, and to the plaintiffs EDWINA RAGER and EDWARD RAGER, was in the approximate sum of One Hundred Seventy-Five Thousand ($175,000.) Dollars.

16. That heretofore, in or about November 27, 1974, and at all the times herein mentioned, the fair and reasonable value and worth of the equity belonging to the plaintiffs EDWINA RAGER and EDWARD RAGER, as sole stockholders and owners of FLOWERVALE in Suffolk County, as aforesaid, was in the approximate sum of Eight Hundred Thousand ($800,000.) Dollars.

17. That on December 6, 1974, and commencing some time prior thereto, the defendants INLAND, GREENSTEIN, STERN and DANE fraudulently and corruptly tricked and deceived the plaintiffs FLOWERVALE, INSPIRATION, EDWINA RAGER and EDWARD RAGER into consummating a purported agreement with the defendants to convey and deed to its wholly owned subsidiary, ARDISCO FINANCIAL CORPORATION, all of the plaintiffs' right, title and interest in and

to the real property and premises situated at 16 East 65th Street, in the Borough of Manhattan, City and State of New York, as aforesaid, upon the express representations, as follows:

(a) that such conveyance and deed to ARDISCO was to be in lieu of any foreclosure of either the said INSPIRATION property or of the plaintiffs' FLOWERVALE property in Suffolk County, as aforesaid;

(b) that the defendants would devote their best efforts to sell the real property at 16 East 65th Street, New York, New York, as aforesaid, at the most advantageous terms, and that the proceeds of the sale thereof would be applied to pay the first and second mortgages of the New York and Suffolk properties aforesaid, together with all accrued interest, real estate taxes and any additional expenses incurred in connection with the sale;

(c) that any surplus remaining after the aforesaid payments would be applied to INLAND for the arrears of interest and taxes on the FLOWERVALE property, and that any surplus beyond that would be used to reduce the principal amount of the FLOWERVALE mortgage;

(d) that the plaintiff EDWARD RAGER would be permitted to exert all his individual efforts to effect an advantageous sale for the purpose aforesaid.

18. That the agreement aforesaid was thereupon set forth by memorandum and in writing by the defendant INLAND, dated December 4, 1974, a duplicate original of which was duly signed and initialed by the defendant DANE on behalf of INLAND on December 6, 1974, as aforesaid, and delivered to the plaintiff EDWARD RAGER at his office on that date, a true copy of which is hereto annexed, marked *Exhibit A*.

19. That further, and prior thereto, in accord with the memorandum of agreement aforesaid, the defendants simultaneously entered into a written agreement on November 27, 1974, with the plaintiffs EDWINA RAGER and EDWARD RAGER on behalf of FLOWERVALE, to extend the FLOWERVALE second mortgage to August 31, 1975, and further specifically agreed not to take or institute any foreclosure action against FLOWERVALE prior to May 31, 1975. A true copy of said agreement is hereto annexed, marked *Exhibit B*.

20. That at all the times mentioned herein, the defendants, and each of them, knew the said representations to be false, and knowingly and malevolently made them intending to deceive and defraud the plaitiffs of their properties aforesaid.

21. That the plaintiffs believed the said representations to be true, and relying upon them, in consideration thereof, did on said December 6, 1974, at 16 East 65th Street, New York, New York, at the specific request of the defendants INLAND CREDIT, DANE and GREENSTEIN, then and there present, sign and execute a deed theretofore prepared by the said defendants, purportedly conveying all of the plaintiffs' right, title and interest of INSPIRATION to the wholly owned subsidiary of the defendants ARDISCO FINANCIAL CORPORATION, pursuant to the agreement as aforesaid.

22. That at the times and place aforesaid and to the actual knowledge of the defendants, the said plaintiff EDWARD RAGER was then and there seriously ill emotionally, mentally and physically, and was then and there in a greatly unstable, weakened and debilitated mental and physical condition, and was then and there mentally incapable of handling or managing his affairs, either in his individual capacity, or as attorney for the plaintiffs INSPIRATION and EDWINA RAGER, and was then and there mentally incapacitated from protecting the legal and equitable rights belonging to the plaintiffs.

22a. That at all the times hereinafter mentioned, the said defendants fraudulently and covinously caused, precipitated, aggravated and compounded the mental illness of the plaintiff EDWARD RAGER, as aforesaid, in order to prevent, thwart, frustrate and bar the said EDWARD RAGER, both individually and as attorney for the plaintiffs INSPIRATION and EDWINA RAGER, from taking any legal action or counter-action against the defendants, or from interposing a prper defense or defenses on the merits to any foreclosure action or summary

dispossess proceeding against the plaintiffs which the defendants, and each of them, then and there fraudulently contemplated taking against the plaintiffs herein, as aforesaid.

22b. That at all the times mentioned herein, the defendants, and each of them, knew the said representations to be false and fraudulent, and knowingly, covinously, collusively and malevolently made such false and fraudulent representations intending to deceive and defraud the plaintiffs of their properties aforesaid.

23. That at all the times herein mentioned, the fraudulent object and intent of the defendants was to acquire all of the plaintiffs' right, title and interest in and to the New York, as well as the Suffolk properties, at a fractional aprt of their actual worth or market value, and that by collusively defrauding and cajoling the plaintiff EDWARD RAGER into surrendering the deed to the defendant ARDISCO "in lieu of foreclosure," as aforesaid, the said defendants effectively deprived and wrongfully divested the plaintiffs of the legal capacity to refinance the existing mortgages on both the New York and Suffolk properties at fair value, in the open market, and further, effectively deprived and wrongfully prevented the plaintiffs from effecting a sale of the premises upon the most advantageous terms pursuant to the terms thereof.

24. That immediately subsequent to said December 6, 1974, and during the entire course of the foreclosure proceedings instituted as hereinafter set forth, the defendants and each of them, in further effectuation of their intent to deceive and defraud the plaintiffs as aforesaid, did deliberately thwart the plaintiffs from all efforts to sell the property aforesaid, as agreed, and the defendants did wrongfully and wantonly sabotage, frustrate, defeat and discourage all potential buyers, as well as al potential efforts by the plaintiffs, to find a suitable buyer, or to sell the property at 16 East 65th Street, New York, New York, for the agreed purposes aforesaid.

25. That further, in effectuation of their intent to deceive and defraud the plaintiffs as aforesaid, the said defendants

maliciously and wantonly demanded of the plaintiffs EDWINA RAGER and EDWARD RAGER that they forthwith surrender the possession and occupancy of the premises aforesaid to ARDISCO; and the said defendants wantonly, wrongfully and maliciously failed and neglected to maintain or service the premises, or to keep it in good repair and condition; and the said defendants did wantonly and maliciously cut off and vandalize the heating system and facilities during the freezing temperatures of the winter seasons of 1974 and 1975 and 1976; and did wantonly and maliciously vandalize and destroy the intercom system in the lobby and vestibule of the premises aforesaid; and further wantonly and maliciously caused a defective condition in the elevator with emission of smoke therefrom for several days causing fire and explosion and resulting in putting the elevator out of commission for approximately two months in or about March or April 1975 and for an additional period of several months during the course of the foreclosure proceedings aforesaid; and further maliciously and wantonly caused the flooding of the premises and the impairment of the ceilings therein; and further, the said defendants did maliciously and wantonly harass, malign and villify the plaintiffs EDWARD RAGER and EDWINA RAGER and did repeatedly coerce, badger, threaten, and attempt to intimidate and terrorize them into surrendering and abandoning the occupancy and possession of the premises forthwith to the defendants as aforesaid, and did maliciously and wantonly persist in a pattern of the tactics and devices aforesaid repeatedly and continuously till the present time, all with consequent and deliberate discouragement to potentia buyers of the premises, and all with wrongful and wanton intent to coerce the plaintiffs to surrender and abandon the possession and occupancy thereof to the defendants.

26. That further, in effectuation of their corrupt intent to deceive and defraud the plaintiffs, as aforestated, the defendants did on said December 6, 1974, then and there, wrongfully and corruptly steal, purloin, misappropriate and remove from

the premises the original signed memorandum of agreement, *Exhibit A,* from the possession and custody of the plaintiffs at the time and place aforestated, and the said defendants did thereafter wilfully refuse and decline to return the said memorandum of agreement, or provide a photocopy of the same, despite the repeated demands by the plaintiffs therefor.

27. That notwithstanding the express written representation and agreement nt to foreclose the plaintiffs' properties, as aforesaid, the defendant INLAND CREDIT did on or about January 27, 1975, fraudulently, wrongfully and corruptly institute and prosecute a foreclosure action against the plaintiffs in the Supreme Court of the State of New York, County of New York, under Index No. 2166/75, and did by fraud and deceit as aforesaid, and by economic threat, coercion and duress, wrongfully cause the plaintiffs to default thereunder, and did, on October 28, 1975, cause and procure a purported judgment of forecosure by default and sale of the mortgaged premises aforesaid; and did on December 11, 1975, cause a purported Referee's Deed in Foreclosure to be conveyed and delivered to the defendant INLAND CREDIT.

28. That, further, notwithstanding the express representation and agreement not to foreclose either the New York property or the Suffolk County property of the plaintiffs EDWINA RAGER and EDWARD RAGER, as aforesaid, the defendant INLAND CREDIT did simultaneously, on or about January 29, 1975, wrongfully, fraudulently and corruptly institute a foreclosure proceeding against the FLOWERVALE, INC. property in Suffolk County, under Index No. 75/1968, and did likewise procure a purported judgment of foreclosure by default on October 30, 1975, entered therein on November 28, 1975, and did likewise cause and effectuate the issuance and delivery of a purported Referee's Deed in foreclosure on or about January 7, 1976, to the defendant PLANTATION, a wholly owned subsidiary corporation belonging to the defendants INLAND CREDIT, STERN and DANE.

29. That by reason of the facts aforestated, the purported

foreclosure actin instituted by INLAND CREDIT against FLOWERVALE in the Supreme Court of the State of New York, County of Suffolk, under Index No. 75/1968, and the purported Referee's Deed in Foreclosure thereunder, are wholly null and void at their inception, and in their entirety, on the grounds of the fraud and deceit by the defendants, and on the ground of lack of mental capacity, as aforestated, and that the purported judgment of foreclosure and the Referee's Deed issued thereunder to the defendant PLANTATION should be cancelled, vacated and set aside of record.

FOR A SECOND CAUSE OF ACTION

30. Plaintiffs repeat and re-allege all of the allegations contained in paragraphs 1 to 29 inclusive and incorporate the same by reference herein, with the same force and effect as if fully set forth in detail herein.

31. That by reason of the facts aforesaid, the plaintiffs have been seriously damaged and injured in their person and in their property, and have suffered great and permanent economic loss; that the plaintiffs EDWINA RAGER and EDWARD RAGER have suffered, now suffer, and will continue to suffer for an indefinite period in the future great mental anguish, and severe emotional distress and illness, all to plaintiffs' damage in the sum of Ten Million ($10,000,000.) Dollars for compensatory and punitive damages.

WHEREFORE, plaintiffs demand that the Court adjudge:

A. That the foreclosure proceeding purportedly instituted by INLAND against FLOWERVALE in the Supreme Court of the Stte of New York, County of Suffolk, under Index No. 75/1968, be deemed and declared null and void at its inception on the ground of fraud and deceit and that the said forecosure proceeding in its entirety, including the purported judgment of foreclosure, rendered November 28, 1975, and the purported Referee's Deed in Foreclosure from WERNER J. ZUMBRUNN, JR., Referee to the Defendant PLANTATION, on or

about January 7, 1976, be vacated, cancelled and set aside.

B. That the foreclosure proceeding aforestated be deemed and declared null and void in its entirety on the ground of mental illness and incapacity of the defendant EDWARD RAGER throughout the entire course of the foreclosure proceedings aforestated, to the actual knowledge of the defendants.

C. That the defendants render to the plaintiffs, a just, true and full account of all money received, as rents, issues or profits from said property; that the defendants pay over to the plaintiffs all such monies; that a Receiver of said property be appointed pending the final determination of this action.

D. That, as further or consequential relief claimed by the plaintiffs herein, the defendants INLAND CREDIT CORPORATION, PLANTATION HOUSE & GARDEN PRODUCTS, INC., and the individual defendants STERN, DANE and GREENSTEIN, be enjoined and restrained, pending the final determination of this action, from selling, assigning or in any way transferring or incumbering said property or any part thereof.

E. That the plaintiffs have judgment for compensatory and punitive damages against the defendants, and each of them, jointly and severally, in the sum of Ten Million ($10,000,000.) Dollars.

F. That the plaintiffs have such other, further and different relief as to the Court may seem just and proper, together with counsel fees, costs and disbursements of the two causes of action herein.

AARON NUSSBAUM
Attorney for Plaintiffs

JOSEPH M. MEEHAN
Co-Counsel for Plaintiffs

EXHIBIT A
LETTER DATED DECEMBER 4, 1974 FROM INLAND

EXHIBIT

INLAND CREDIT CORPORATION

685 FIFTH AVENUE · NEW YORK, N.Y. 10022 · (212) 687-3400

December 4, 1974

Mrs. Edwina Rager, President
Inspiration Enterprises, Inc.
29 Maple Street
Blue Point, Long Island

Re: 16 East 65th Street

Dear Mrs. Rager:

Pursuant to conversation among Mr. Dane, Mr. Greenstein and Dr. Rager, we have agreed as follows:

You will sign a deed to the above property in lieu of foreclosure. This deed will be made to ARDISCO FINANCIAL CORPORATION, which is a wholly owned subsidiary of Inland Credit Corporation. Upon receiving the deed, we and Ardisco Financial Corporation will use its best efforts to sell the property, including placing of proper sign on building and diseminating information to brokers, and from the proceeds of the sale will pay the first and second mortgage and accrued interest, real estate taxes and any additional expenses incurred in connection with the sale. Any surplus after the above payments, it will pay to Inland Credit Corporation for the arrears of interest and taxes on the Flowervale property and any surplus beyond that will be used to reduce the principal amount of the Flowervale mortgage.

You are granted, upon signing of the deed, sixty (60) days to remove all personal property from the building.

Very truly yours,

INLAND CREDIT CORPORATION

Oscar Dane
Chairman of the Board

OD:mez

Ex. A

EXHIBIT B

November 27, 1974

Inland Credit Corporation
685 Fifth Avenue
New York, N. Y.

Gentlemen:

This letter shall constitute our agreement as follows.

1. Whenever used in this agreement, the word "Consolidation" shall mean and include the consolidation and extension agreement between us dated May 5, 1972, recorded in the Office of the Suffolk County Clerk on May 10, 1972 in Volume 6356 at page 131, and the mortgages covered thereby.

2. All payments of interest otherwise payable on the Consolidation between now and April 30, 1975 shall be deferred to and become payable with the unpaid principal balance of the Consolidation. However, interest from May 1, 1975 shall be payable on May 31, 1975.

3. To induce you to grant this extension to us and in consideration thereof,

3.01 we acknowledge and confirm that the unpaid principal balance of the Consolidation is $91,805.81 and that no interest installments have been made on that sum since October 1, 1974;

3.02 all payments of principal and interest on any mortgages senior in lien to the Consolidation shall be paid as and when they become due;

3.03 all real estate taxes covering the property described in the Consolidation will be kept current and paid as they become due;

3.04 we will comply with all of the other terms and conditions of the Consolidation.

3.05 if the aforementioned conditions are met the mortgage will be extended ~~[illegible]~~ August 31 1975.

4. All of the terms, covenants and conditions of the Consolidation, as modified by this agreement, shall remain in full force and effect and shall apply to any defaults under paragraph 3 hereof or under the provisions of the Consolidation.

5. This agreement cannot be changed or terminated orally.

Very truly yours,

FLOWERVALE, INC.

By _____
Edwina Rager, President

The undersigned, as guarantors of the Consolidation, consent to the execution and delivery of the foregoing agreement.

_____
Edwina Rager

_____
Edward Rager

Accepted and Agreed to

INLAND CREDIT CORPORATION

By _____

AMENDED VERIFIED ANSWER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

FLOWERVLE, INC., EDWINA RAGER
and EDWARD RAGER,

Plaintiffs,

-against-

INLAND CREDIT CORPORATION, PLANTATION
HOUSE & GARDEN PRODUCTS, INC.,
STANLEY E. STERN, OSCAR DANE and
HAROLD GREENSTEIN,

Defendants.

Defendants, by their attorneys, Dreyer and Traub, answering the amended verified complaint, respectfully allege and show this Court as follows:

WITH RESPECT TO THE FIRST CAUSE OF ACTION:

1. Admit each and every allegation contained within paragraphs 1, 2, 4, 5, 7, 8, 10, 13 and 14 of the amended complaint.

2. Deny each and every allegation contained within paragraphs 3, 6, 9, 12, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28 and 29 of the amended complaint.

3. With respect to paragraph 11 of the amended complaint, admit that defendant, Oscar Dane, was and still is an executive officer of defendant, Inland Credit Corporation but except as

so admitted, denies each and every allegation contained in paragraph 11 of the amended complaint.

4. With respect to paragraph 21 of the amended complaint, admit that plaintiff did execute and deliver to Ardisco Financial Corporation a deed to the premises located at and known as 16 East 65th Street, New York, New York, but except as so admitted, deny each and every allegation contained within paragraph 21 of the amended complaint.

WITH RESPECT TO THE SECOND CAUSE OF ACTION

5. Defendants repeat and reallege each and every allegation contained within paragraphs 1 through 4 of this answer as though hereinafter set forth at length.

6. Deny each and every allegation contained within paragraph 31 of the amended complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

7. There is pending in Supreme Court, New York County under Index No. 4252/76 another action in which some or all of the issues pertaining to the allegations of the complaint respecting the foreclosure of the property at 16 East 65th Street, are in litigation.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

8. In February, 1975, defendant, Inland Credit Corporation duly commenced an action in this Court under Index No. 75/1968 (the "Prior Action") to foreclose a consolidated mortgage held by Inland Credit Corporation upon the real property located at Flowervale Gardens, Bayport, in the Town of Islip, County of Suffolk, which is one of the mortgages referred to in the amended complaint in this action. Flowervale, Inc. was named as a defendant in the Prior Action and was duly served with the summons and complaint therein and appeared therein

by plaintiff, Edward Rager, as its attorney.

9. A judgment of foreclosure and sale was duly entered in the Prior Action in favor of Inland Credit Corporation and the real property which was the subject matter thereof was duly sold pursuant to and in accordance with the terms of that judgment. All of the issues set out in the complaint herein were either or could have been litigated in the Prior Action and the judgment sought by plaintiffs in this action, if granted, would destroy the status and effect of the judgment entered in the Prior Action.

10. By reason of the foregoing, each of the alleged causes of action pertaining to the Suffolk County property has been previously determined and adjudicated and is now merged in the judgment in the Prior Action and plaintiffs are barred from bringing this and any further action with respect thereto.

WHEREFORE, the defendants herein demand judgment dismissing the complaint together with the costs and disbursements of this action.

Dated: New York, New York
July 16, 1976

DREYER AND TRAUB
Attorneys for Defendants
90 Park Avenue
New York, N.Y. 10016
(212) 661-8800

[Verified by Stanley Stern
on July 19, 1976]

AMENDED VERIFIED COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

INSPIRATION ENTERPRISES, INC.,
EDWINA RAGER and EDWARD RAGER,

Plaintiffs,

-against-

INLAND CREDIT CORPORATION, ARDISCO FINANCIAL CORPORATION, STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN,

Defendants.

The plaintiffs, complaining of the defendants, by AARON NUSSBAUM, their attorney, respectfully show to this Court and allege as follows:

FOR A FIRST CAUSE OF ACTION

1. The plaintiff INSPIRATION ENTERPRISES, INC. (hereinafter called INSPIRATION) is a corporation duly organized under the Laws of the State of New York and maintains its principal office at Sixteen East Sixty-fifth Street, Borough of Manhattan, County, City and State of New York.

2. Heretofore, commencing 1957, and at all the times hereinafter mentioned, the plaintiff INSPIRATION was and still is the owner, in fee simple of the premises, land and real estate known and designed as Number Sixteen East Sixty-fifth Street, Borough of Manhattan, City and State of New York, and described as follows:

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

BEGINNING at a point on the southerly side of 65th Street, distant 262 feet easterly from the corner formed by the intersection of the southerly side of 65th Street with the easterly side of Fifth Avenue;

RUNNING THENCE southerly, parallel with Fifth Avenue and part of the distance through a party wall, 100 feet 5 inches to the center line of the block between 64th and 65th Streets;

THENCE easterly, along the center line of the block and parallel with 65th Street, 20 feet;

THENCE northerly, parallel with Fifth Avenue and part of the distance through a party wall; 100 feet 5 inches to the southerl side of 65th Street; and

THENCE westerly, along the same, 20 feet to the point or place of Beginning.

The premises aforesaid are known and designated as Block 1379, Section 5, Lot No. 62.

3. At all the times hereinafter mentioned, the fair market value and reasonable worth of real property and premises aforesaid is in the approximate sum of Four Hundred Fifty Thousand ($450,000.) Dollars.

4. AT all the times hereinafter mentioned, the plaintiff EDWINA RAGER was and is the president of INSPIRATION, and the plaintiff EDWARD RAGER was and is the secretary thereof, and the said plaintiffs were and are the sole owners and officers and stockholders of INSPIRATION.

5. Heretofore and for many years past, and at all the times hereinafter mentioned, the plaintiffs EDWARD RAGER and EDWINA RAGER were likewise the sole owners and stockholders of FLOWERVALE, INC., hereinafter called FLOWERVALE, a New York corporation actively engaged in the growth, nurturing and sale of horticultural products; that FLOWERVALE consisted of approximately seven and one half acres of land, located in Bayport, Islip Township, Suffolk

County, State of New York, of the market value and reasonable worth of approximately Five Hundred Thousand ($500,000.) Dollars, and further consisted of various buildings, residences and greenhouses containing about 50,000 square feet of glass of the fair market value and reasonable worth, together with the good will thereon, of the approximate sum of Five Hundred Thousand ($500,000.) Dollars, for a total fair and reasonable value and worth of FLOWERVALE in the approximate sum of One Million ($1,000,000.) Dollars.

6. At all the times hereinafter mentioned, upon information and belief, the defendant INLAND CREDIT CORPORATION (hereinafter called INLAND CREDIT) is a corporation organized under the Laws of the State of New York, engaged in the principal business of second mortgage financing of real property.

7. At all the times hereinafter mentioned, upon information and belief, the defendant ARDISCO FINANCIAL CORPORATION (hereinafter called ARDISCO) is a corporation organized under the Laws of the State of New York, and is a wholly owned subsidiary corporation of the defendant INLAND CREDIT.

8. Upon information and belief, at all the times hereinafter mentioned, the defendants INLAND CREDIT and its subsidiary ARDISCO were wholly owned, managed and controlled by the defendants STANLEY E. STERN (hereinafter called STERN) and OSCAR DANE (hereinafter called DANE), and the said defendants STERN and DANE were at all times mentioned herein the sole stockholders of each of the defendant corporations aforesaid.

9. Upon information and belief, at all times hereinafter mentioned, the defendant STERN was the president of the defendant corporations INLAND CREDIT and ARDISCO, and at all times operated under the name and designation of STERN MANAGEMENT for the defendant corporations aforesaid.

10. Upon information and belief, at all times hereinafter mentioned, the defendant DANE was an executive officer and the Chairman of the Board of Directors of the said defendant

corporations INLAND CREDIT and ARDISCO.

11. Upon information and belief, at all times hereinafter mentioned, the defendant HAROLD GREENSTEIN (hereinafter called GREENSTEIN), was the Executive Vice-President of the defendant corporations INLAND CREDIT and ARDISCO.

12. That heretofore, and on May 2, 1972, the defendant INLAND CREDIT issued a second mortgage loan to the plaintiff INSPIRATION covering the INSPIRATION property at 16 East 65th Street, New York, New York, on a consolidated mortgage, in the amount of $160,000., subject to a reduced first mortgage lien thereon in the original amount of approximately $140,000.

13. That heretofore, on the same date, May 2, 1972, the defendant INLAND CREDIT simultaneously granted a second mortgage loan in the sum of $100,000. to FLOWERVALE, covering the real estate and premises in Suffolk County as aforesaid, subject to a reduced first mortgage lien thereon in the original amount of $110,000.

14. That heretofore, in or about November 1974, and at all times mentioned herein, the fair and reasonable value and worth of the equity belonging to the plaintiff INSPIRATION in and to its real property situated at 16 East 65th Street, Borough of Manhattan, City and State of New York, and to the plaintiffs EDWINA RAGER and EDWARD RAGER, was in the approximate sum of One Hundred Seventy-five Thousand ($175,000.) Dollars.

15. That heretofore, in or about November 27, 1974, and at all the times herein mentioned, the fair and reasonable value adn worth of the equity belonging to the plaintiffs EDWINA RAGER and EDWARD RAGER, as sole stockholders and owners of FLOWERVALE in Suffolk County, as aforesaid, was in the approximate sum of Eight Hundred Thousand ($800,000.) Dollars.

16. That on December 6, 1974, and commencing some time prior thereto, the defendants falsely, fraudulently and corruptly tricked and deceived the plaintiffs into consummating a purported agreement with the defendants to convey and deed to the defendant ARDISCO all of the plaintiffs' right, title and interest in and to the real property and premises situated at 16 East 65th Street, in the Borough of Manhattan, City and State of New York, as aforesaid upon the express representations:

(a) that such conveyance and deed to ARDISCO was to be in lieu of any foreclosure of either the said INSPIRATION property or of the plaintiffs' FLOWERVALE property in Suffolk County, as aforesaid;

(b) that the defendants would devote their best efforts to sell the real property at 16 East 65th Street, New York, as aforesaid, at the most advantageous terms, and that the proceeds of the sale thereof would be applied to pay the first and second mortgages of the New York and Suffolk properties aforesaid, together with all accrued interest, real estate taxes and any additional expenses incurred in connection with the sale;

(c) that any surplus remaining after the aforesaid payments would be applied to INLAND for the arrears of interest and taxes on the FLOWERVALE property, and that any surplus beyond that would be used to reduce the principal amount of the FLOWERVALE mortgage;

(d) that the plaintiff EDWARD RAGER would be permitted to exert all reasonable efforts to effect an advantageous sale for the purposes aforesaid;

(e) that the defendants would exert their best efforts to permit the plaintiff EDWARD RAGER to enter into an annual lease with any prospective buyer, permitting his occupancy of the first and second floors and the vaulted basement in the said premises as theretofore, both as to his residence and law office therein;

(f) that, in any event, the plaintiffs EDWINA RAGER and EDWARD RAGER reserved the right to occupy the first and second floors and basement as heretofore, for a period of sixty (60) days from the date of the proposed sale of the premises; and

(g) that, in the interim, the defendants would maintain and service the premises and furnish and supply all management,

heating, cleaning and repair services and facilities, as shall be necessary, in accord with the purposes aforestated.

17. That the agreement aforesaid was thereupon set forth by memorandum and in writing by the defendant INLAND, dated December 4, 1974, a duplicate original of which was signed and initialed by the defendant DANE on behalf of INLAND on said December 6, 1974, and purportedly delivered to the plaintiff EDWARD RAGER at his office on that date, a true copy of which is hereto annexed marked *Exhibit A*.

18. That further, and prior thereto, in accord with the memorandum of agreement aforesaid, the defendants likewise entered into a written agreement on November 27, 1974, with the plaintiffs EDWINA RAGER and EDWARD RAGER on behalf of FLOWERVALE, to extend the FLOWERVALE second mortgage to August 31, 1975, and further specifically agreed not to take or institute any foreclosure action against FLOWERVALE prior to May 31, 1975. A true copy of said agreement is hereto annexed, marked *Exhibit B*.

19. That the plaintiffs believed the said representations to be true, and relying upon them in consideration thereof, did on said December 6, 1974, at 16 East 65th Street, New York, New York, at the specific request of the defendants INLAND CREDIT, DANE and GREENSTEIN, then and there, sign and execute a deed theretofore prepared by the said defendants purportedly conveying all of the plaintiffs' right, title and interest of INSPIRATION to the defendant ARDISCO FINANCIAL CORPORATION, a wholly owned subsidiary of the defendants, as aforesaid.

20. That subsequently, on December 11, 1974, the said defendants caused the plaintiff EDWARD RAGER, individually, and as attorney for INSPIRATION, to execute and deliver to ARDISCO, a purported stockholders' consent to the deed from INSPIRATION to ARDISCO, dated December 6, 1974, as aforestated, to which consent the said plaintiff EDWARD RAGER added in his own handwriting the following words: "As per letter permitting to stay." A copy of the purported stockholders' consent is hereto annexed, marked *Exhibit C*.

21. That at the times and place aforesaid and to the actual

knowledge of the defendants, the said plaintiff EDWARD RAGER was then and there seriously ill emotionally, mentally and physically and was then and there in a greatly unstable, weakened and debilitated mental and physical condition, and was then and there mentally incapable of handling or managing his affairs, either in his individual capacity, or as attorney for the plaintiffs INSPIRATION and EDWINA RAGER, and was then and there mentally incapacitated from protecting the legal and equitable rights belonging to the plaintiffs.

21a. That at all the times hereinafter mentioned, the said defendants fraudulently and covinously caused, precipitated, aggravated and compounded the mental illness of the plaintiff EDWARD RAGER, as aforesaid, in order to prevent, thwart, frustrate and bar the said EDWARD RAGER, both individually and as attorney for the plaintiffs INSPIRATION and EDWINA RAGER, from taking any legal action or counter-action against the defendants, or from interposing a proper defense or defenses on the merits to any foreclosure action or summary dispossess proceeding against the plaintiffs which the defendants, and each of them, then and there fraudulently contemplated taking against the plaintiffs herein, as aforesaid.

22. That at all the times mentioned herein, the defendants, and each of them, knew the said representations to be false and fraudulent, and knowingly, covinously, collusively and malevolently made such false and fraudulent representations intending to deceive and defraud the plaintiffs of their properties aforesaid.

23. That in truth and in fact, the object of the fraud aforesaid against the plaintiffs was to acquire under color of the fraudulent foreclosure, and by means of the ARDISCO deed wrongfully extracted from the plaintiffs as aforestated, all of their right, title and interest in and to the New York, as well as the Suffolk properties belonging to the plaintiffs, at a fractional part of their actual worth or market value; and further that, by collusively defrauding and cajoling the plaintiff EDWARD RAGER into surrendering the deed to the defendant ARDISCO "in lieu of foreclosure," the said defendants effectively deprived and wrongfully prevented the plaintiffs of and from the

capacity to refinance the existing mortgages on both the New York and Suffolk properties, in the open market, and further, effectively deprived the plaintiffs from effecting a sale of the premises upon the most advantageous terms.

24. That immediately subsequent to said December 6, 1974, and during the entire course of the foreclosure proceedings instituted as hereinafter set forth, the defendants and each of them, in further effectuation of their intent to deceive and defraud the plaintiffs as aforesaid, did deliberately thwart the plaintiffs from all efforts to sell the property aforesaid, as agreed, and the defendants did wrongfully and wantonly sabotage, frustrate, defeat and discourage all potential buyers, as well as all potential efforts by the plaintiffs, to find a suitable buyer, or to sell the property at 16 East 65th Street, New York, for the agreed purposes aforesaid.

25. That further, in complete bad faith and in effectuation of their intent to deceive and defraud the plaintiffs as aforesaid, the said defendants repeatedly demanded of the plaintiffs EDWINA RAGER and EDWARD RAGER that they forthwith surrender the possession and occupancy of the premises aforesaid to ARDISCO; and the said defendants deliberately and designedly failed and neglected to maintain or service the premises, or to keep it in good repair and appearance; and the said defendants did deliberately and designedly cut off and vandalize the heating facilities during the freezing temperatures of the winter seasons of 1974 and 1975; and further permitted a defective condition in the elevator with emission of smoke therefrom for several days causing fire and explosion and resulting in putting the elevator out of commission for approximately two months in or about March or April 1975; and further, permitted and caused the flooding of the premises and the impairment of the ceilings therein; and further, the said defendants did repeatedly, deliberately and wantonly harass, malign and villify the plaintiffs EDWARD RAGER and EDWINA RAGER and did repeatedly attempt to coerce, badger, intimidate and terrorize them into surrendering the occupancy and possession of the premises to the defendants as aforesaid, and did unremittingly persist in engaging in the tactics and

devices aforesaid continuously till the present time, all with consequent and deliberate discouragement to potential buyers of the building, and to force the plaintiffs to surrender and abandon the possession and occupancy thereof.

26. That further, in effectuation of their corrupt intent to deceive and defraud the plaintiffs, as aforestated, the defendants did on said December 6, 1974, then and there, wrongfully and corruptly steal, purloin, misappropriate and remove from the premises the original signed memorandum of agreement, *Exhibit A,* from the possession and custody of the plaintiffs at the time and place aforestated, and the said defendants did thereafter willfully refuse and decline to return the said memorandum of agreement, *Exhibit A,* or provide a photocopy of the same, despite the repeated demands by the plaintiffs therefor.

27. That notwithstanding the express written representation and agreement not to foreclose the plaintiffs' properties, as aforesaid, the defendant INLAND CREDIT did on or about January 27, 1975, fraudulently, wrongfully and corruptly institute and prosecute a foreclosure action against the plaintiffs in the Supreme Court of the State of New York, County of New York, under Index No. 2166/75, and did by economic threat, coercion and duress, cause the plaintiffs to default thereunder, and did, on October 28, 1975, cause and procure a purported judgment of foreclosure and sale of the mortgaged premises aforesaid; and did on December 11, 1975, cause a purported Referee's Deed in Foreclosure to be conveyed and delivered to the defendant INLAND CREDIT.

28. That further, notwithstanding the express representation and agreement not to foreclose either the New York property or the Suffolk County property of the plaintiffs EDWINA RAGER and EDWARD RAGER, as aforesaid, the defendant INLAND CREDIT did simultaneously, on or about January 29, 1975, wrongfully, fraudulently and corruptly institute a foreclosure proceeding against the FLOWERVALE, INC. property in Suffolk County, under Index No. 75/1968, and did likewise procure a purported judgment of foreclosure by default

therein on October 30, 1975, entered therein on November 28, 1975, and did likewise cause and effectuate the issuance and delivery of a purported Referee's Deed in foreclosure on or about January 7, 1976, to a wholly owned subsidiary corporation belonging to the defendants INLAND CREDIT, STERN and DANE.

29. That subsequently, pursuant to the judgment of foreclosure against INSPIRATION, as aforestated, the mortgaged premises 16 East 65th Street, New York, New York, were directed and authorized to be sold in one parcel at public auction at the Rotunda of the New York County Courthouse, 60 Centre Street, New York, New York, by and under the direction of Joseph A. Fontanelli, Jr., who hads been thereby appointed Referee for that purpose.

30. That the said judgment of foreclosure further directed that the Referee give public notice in the New York Law Journal of the time and place of the sale, pursuant to *Section 231 of the Real Property Actions and Proceedings Law and Rule 660.15 of the Rules of the New York County Supreme Court.*

31. Upon information and belief, such public notice of the sale as aforesaid was last published in the New York Law Journal on November 28, 1975, announcing the date of public sale of the foreclosed premises to be December 5, 1975.

32. Upon information and belief, that on said December 5, 1975, a seriously interested willing and able buyer of the purportedly foreclosed mortgaged premises did appear at the time and place advertised in the notice of sale aforestated for the purpose of suitable bidding thereat, but neither the Referee in Foreclosure nor the defendant INLAND CREDIT, nor any person acting in their behalf, were then and there physically present, or otherwise, and no postponement or adjournment of the sale or other public announcement had been made or posted at that time and place, as aforestated.

31. Upon information and belief, such public notice of the sale as aforesaid was last published in the New York Law Journal on November 28, 1975, announcing the date of public sale of the foreclosed premises to be December 5, 1975.

32. Upon information and belief, that on said December 5, 1975, a seriously interested willing and able buyer of the purportedly foreclosed mortgaged premises did appear at the time and place advertised in the notice of sale aforestated for the purpose of suitable bidding thereat, but neither the Referee in Foreclosure nor the defendant INLAND CREDIT, nor any person acting in their behalf, were then and there physically present, or otherwise, and no postponement or adjournment of the sale or other public announcement had been made or posted at that time and place, as aforestated.

33. Upon information and belief, the sale of the mortgaged premises was illegally adjourned and postponed by or on behalf of the defendants from December 5, 1975 to December 11, 1975, without any public notice thereof or by readvertising as required by *Section 231, subd. 3, of the Real Property Actions and Proceedings Law,* and without any further notice to the plaintiffs whatsoever.

34. That subsequently, upon information and belief, the sale of the mortgaged premises was finally effected and consummated on December 11, 1975, by a purported Referee's Deed in Foreclosure dated that date between Joseph A. Fontanelli, Jr., Referee, and INLAND CREDIT CORPORATION, as Grantee, and said Referee's Deed was purportedly acknowledged before a Notary Public on December 19, 1975.

35. That by reason of the facts aforestated, the foreclosure action purportedly instituted by INLAND CREDIT against INSPIRATION in the Supreme Court of the State of New York, County of New York, under Index No. 2166/75 is wholly null and void at its inception, in its entirety, on the ground of the fraud and deceit by the defendants, as aforestated.

36. That by reason of the facts aforestated, the purported deed and conveyance granted by INSPIRATION to ARDISCO on December 6, 1974 is wholly null and void on the ground of the fraud and deceit by the defendants as hereinabove set forth.

37. That by reason of the facts aforestated, the Referee's sale of the mortgaged premises aforesaid, and the purported deed from the Referee to INSPIRATION, are wholly null and void, and should be cancelled of record, on the ground that the defendants failed to comply with the applicable statutes governing the public sale of mortgaged property under foreclosure.

38. That by reason of the facts aforestated, the plaintiffs have been wrongfully deprived of their properties and have sustained great economic and financial losses thereby.

FOR A SECOND CAUSE OF ACTION

39. Plaintiffs repeat and re-allege all of the allegations contained in paragraphs 1 to 38 inclusive and incorporate the same by reference herein, with the same force and effect as if fully set forth in detail herein.

40. That by reason of the facts aforesaid, the plaintiffs have been seriously damaged and injured in their person and in their property, and have suffered great and permanent economic loss; that the plaintiffs EDWINA RAGER and EDWARD RAGER have suffered, now suffer, and will continue to suffer for an indefinite period in the future great mental anguish, and severe emotional distress and illness, all to plaintiffs' damage in the sum of Ten Million ($10,000,000.) Dollars for compensatory and punitive damages.

WHEREFORE, plaintiffs demand that the Court adjudge:

A. That the foreclosure proceeding purportedly instituted by INLAND against INSPIRATION in the Supreme Court of the State of New York, County of New York, under Index No. 2166/75 be deemed and declared null and void at its inception on the ground of fraud and deceit and that the said foreclosure proceeding in its entirety, including the purported judgment of foreclosure, rendered October 28, 1975, and the purported Referee's Deed in Foreclosure from Joseph A. Fontanelli, Jr., Referee to INLAND CREDIT CORPORATION, dated December 11, 1975, be vacated, cancelled and set aside.

B. That the purported Deed and conveyance from INSPIRATION ENTERPRISES, INC., to ARDISCO FINANCIAL CORPORATION, dated December 6, 1974, be declared null and void on the ground of fraud and deceit and that the said deed, recorded in the Register's Office on December 12, 1974, in Reel 331, page 19, be cancelled of record.

C. That the purported Referee's sale of the mortgatged premises situated at 16 East 65th Street, New York, New York, under Index No. 2166/75, and the purported Referee Deed in Foreclosure granted thereunder by Joseph A. Fontanelli, Jr., Referee, to INLAND CREDIT CORPORATION, as grantee, be adjudged and declared null and void, and vacated and set aside for failure to comply with *Section 231, subd. 3 and Section 1403 Real Property Actions and Proceedings Law,* as aforestated.

D. That, as further or consequential relief claimed by the plaintiffs herein, the defendants ARDISCO FINANCIAL CORPORATION, INLAND CREDIT CORPORATION, and the individual defendants, STERN, DANE and GREENSTEIN, be enjoined and restrained, pending the final determination of this action, from selling, assigning or in any way transferring or incumbering said property or any part thereof.

E. That the said defendants, or any person or agent acting in their behalf, be enjoined and restrained, pending the final determination of this action, from commencing or pursuing any dispossess or eviction proceedings against the plaintiffs EDWINA RAGER and EDWARD RAGER.

F. That the plaintiffs have judgment for compensatory and punitive damages against the defendants, and each of them, jointly and severally in the sum of Ten Million ($10,000,000.) Dollars.

G. That the plaintiffs have such other, further and different relief as to the Court may seem just and proper, together with counsel fees, costs and disbursements of the two causes of action herein.

AARON NUSSBAUM
Attorney for Plaintiffs

JOSEPH M. MEEHAN
Co-Counsel for Plaintiffs

EXHIBIT A TO FOREGOING COMPLAINT

INLAND CREDIT CORPORATION
685 FIFTH AVENUE · NEW YORK, N.Y. 10022 · (212) 687-3400

December 4, 1974

Mrs. Edwina Rager, President
Inspiration Enterprises, Inc.
29 Maple Street
Blue Point, Long Island

Re: 16 East 65th Street

Dear Mrs. Rager:

Pursuant to conversation among Mr. Dane, Mr. Greenstein and Dr. Rager, we have agreed as follows:

You will sign a deed to the above property in lieu of foreclosure. This deed will be made to ARDISCO FINANCIAL CORPORATION, which is a wholly owned subsidiary of Inland Credit Corporation. Upon receiving the deed, we and Ardisco Financial Corporation will use its best efforts to sell the property, including placing of proper sign on building and diseminating information to brokers, and from the proceeds of the sale will pay the first and second mortgage and accrued interest, real estate taxes and any additional expenses incurred in connection with the sale. Any surplus after the above payments, it will pay to Inland Credit Corporation for the arrears of interest and taxes on the Flowervale property and any surplus beyond that will be used to reduce the principal amount of the Flowervale mortgage.

You are granted, upon signing of the deed, sixty (60) days to remove all personal property from the building.

Very truly yours,

INLAND CREDIT CORPORATION

Oscar Dane
Chairman of the Board

OD:mez

OVER TWENTY-FIVE YEARS OF SUCCESSFUL REAL ESTATE & COMMERCIAL FINANCING

ORDER OF NEW YORK SUPREME COURT, COUNTY OF NASSAU DATED 9/3/75.

Present: HON. MARIO PITTONI, *Justice.*

INLAND CREDIT CORPORATION,

Plaintiff,

-against-

FLOWERVALE, INC., et al.,

Defendants.

INDEX NUMBER—SUFFOLK 75, 1968.
MOTION DATE JULY 1, 1975
MOTION CAL. NUMBER 6844

The following papers numbered 1 to 7 read on this motion to open a default and vacate an order of reference:

	Papers Numbered
Notice of Motion	1-4
Answering Affidavits	5-6
Pleadings	7

Upon the foregoing papers it is ordered that this motion by defendants for an order vacating a default, vacating an order of reference, staying all proceedings; or in the alternative for an order permitting defendant Flowervale, Inc. to interpose an answer on the merits is *denied* in all respects.

The moving affidavit in support of this motion fails to set

forth facts indicating a reasonable excuse for the default, nor does it present a factual basis for a meritorious defense. In the rambling, almost incoherent, moving affidavit by the attorney for the defendant, there is no denial that process was served, there is no explanation whatever as to why defendant defaulted, and there is no suggestion as to a meritorious defense to this action for foreclosure.

So ordered.

Dated 9/3/75 s/M. Pittoni

TELEGRAM SENT BY EDWARD RAGER TO COURT

HONORABLE MARIO PITTONI JUSTICE
SUPREME COURT
MINEOLA NY 11501

GRAVE ILLNESS WIFE IN NEW JERSEY CAUSED BY BEATING, MURDER ATTEMPTS AND OTHER TRAGEDY OBLIGE BE THERE, PRIOR MAY 21 WROTE LAZER, J. AT SPECIAL ONE SUFFOLK FOR TIME SUBMIT OPPOSING PAPERS ON MOTION FOR JUDGMENT IN INLAND V. FLOWERVALE ON THAT DAY. ALSO REQUESTED LOCAL ATTORNEY APPEAR. JUST LEARNED NOTICE ORDER BEFORE YOU GRANTING JUDGMENT BY DEFAULT, BEG NOT SIGN OR IF SIGNED GRANT STAY. HAD MOVED IN NEW YORK COUNTY IN ACTION V. INLAND FOR JUDGMENT AND OTHER RELIEF ON DOCUMENTARY EVIDENCE SHOWING AGREEMENT NOT TO FORECLOSE. PROPERTY WORTH SEVERAL TIME AMOUNT UNCONSCIONABLE MORTGAGE. FORECLOSURE WOULD WIPE OUT POOR SMALL INVESTORS. PROOF GROSS FRAUD AND INIQUITY. WIFE STILL IN DANGER. BEG TILL JUNE 23 SUBMIT ANSWER BRING PAPERS AND RESPONSE TO 370 PASCACK ROAD WESTWOOD NEW JERSEY 07675

EDWARD HAGER

NOTICE OF MOTION MADE BY EDWARD RAGER DATED JUNE 23, 1975

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

INLAND CREDIT CORPORATION,

Plaintiff,

-against-

FLOWERVALE, INC., et al.,

Defendants.

INDEX NO. 75-1968

MOST URGENT—IMMEDIATE INJUNCTIVE RELIEF NEEDED COURT REQUESTED NOT TO DELAY BY REFERRAL TO JUSTICE PITTONI IN EVENT OF ABSENCE, VACATION, ETC.

SIRS:

Take Notice that on the annexed affirmation of Edward Rager, on the order of this Court, granting judgment in favor of Inland Credit Corporation on the alleged default of defendant Flowervale, on the notice dated June 16, 1975, for a hearing before Honorable Werner Zumbrunn, on June 26, 1975, on the proposed answer herein, and on all the proceedings had, defendant Flowervale will move at Special Term, Part One, of this Court, at Griffing Avenue, Riverhead, New York, on July 1, 1975, at 9:30 a.m., for an order vacating the alleged default, vacating said order of reference pursuant thereto, staying all proceedings on the part of plaintiff, pending the final decision by Supreme Court, New York County, on the application pertaining to the issues herein, or in the alternative permitting defendant Flowervale, Inc. to interpose an answer on the merits, and granting such other relief as the Court may deem just. Leave for service supplemental summons and cross claim also requested as per the attached.

Answering papers, if any, shall be served at least five days before

the return of the motion, and the attorneys for plaintiff and the Referee, are requested, as officers of the Court, not to proceed in meantime, lest irreparable injury is inflicted not only on Flowervale but also on innocent investors so that they do not lose all their savings and suffer other hardship.

Dated: June 23, 1975
To: Aranow, Brodsky,
Bohlinger, et al
Attorneys for Plaintiff

Edward Rager
Attorney for Defendants
16 East 65th Street
New York, New York 10021

* * * * *

AFFIRMATION OF EDWARD RAGER DATED JUNE 23, 1975

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

INLAND CREDIT CORPORATION,

Plaintiff,

v.

FLOWERVALE, INC.,

Defendants.

STATE AND COUNTY OF NEW YORK

Edward Rager, an attorney at law, affirms under penalties of perjury:

At the outset I cannot stress too strongly that my prime concern in making the appeal to this Court for justice is not myself but first of all, protecting the life and liberty, such as it is, of my wife Edwina.

My economic concern is to do everything I possibly can so Flowervale is not taken over by the loansharks but it can be either sold to some flower grower (there are not many left) capable of operating it under a profit or if it must be eliminated as a flower growing concern that its very valuable land should bring in its very minimum value of five hundred thousand dollars. This would bring in a sufficiently large surplus to take

care of the investments of Genia Draznin in Queens County, Margaret Ebel, White Plains, Westchester County, and Marion Fegan, who though an investor only in Rose Fair would be fully entitled as the daughter of my number one lady client when I started as an attorney and believed in me up to her very death, can participate in whatever share is mine as controlling stockholder.

As for secondary investors, whose claims are doubtful because of the wrongs they perpetrated, Emil Sorensen of Pennsylvania — a settlement for about half would be satisfactory.

As for Frank D. Mather, who, after over thirty years on my usually without payment very valuable services to him, his delinquent son and the rest of his family, and putting up with his inefficiency, awful neglects and usurious demands, suddenly indulged in increased larcenous and other outrageous conduct and seized possession and control of Flowervale since December 1974 without any accounting therefor, he should get nothing, and I am hereby asking the persons above named, should something happen to me or Edwina, my wife, to go either to the Legal Aid Society or perhaps also to Civil Liberties or to some very prominent powerful persons who will not brook any political injustice and ask them to intervene in this and in the Mather action, pending at present in this Court and also one against him in New York County.

I regret that after forty-nine years of practice, due to the fiendish occurrences and attacks in Suffolk County, which have spread to New York County and to New Jersey, it is impossible for me to appear as attorney in either of the two states unless by some miracle the news coverup or mrerely a malicious disclosure are eliminated and the American Nation knows the truth of the price one pays for fighting for truth and justice and exposing hypocrisy and corruption.

I am dictating this in a state of fever so I trust I shall not be accused of rambling but if any of my or Edwina's Judges, lay or otherwise, were flogged daily for years with whips of iniquity I wonder how coherent they would be.

I am making a part of this affirmation my annexed proposed answer with a proposed counter claim and cross claim and other relief. I subscribe fully to the truth of all the statements therein except as to those made on information and belief and as to them I believe them to be true.

On May 16, 1975, I was obliged to be in New Jersey to help save my wife Edwina. She had been beaten up and almost strangled on April 26, 1975. Instead of arresting the beaters, the Police, influenced from above, arrested her and since then other attacks occurred.

Under the impression that Justice Lazer was sitting and not Justice DeLuca, who as a matter of common decency should disqualify himself, I wrote a letter to Justice Lazer, to the Clerk of the Court, asking for time to submit on the malevolently conceived motion for judgment despite the fact that the matters in New York County pertaining to this had not been resolved. I followed it up with other letters. I also requested the son of Mrs. Draznin, Arthur, to appear in Court on May 21, 1975, and most reluctantly also attorney Davidow in Patchogue, New York, who has been helping Mather to harm Flowervale, to ask for an adjournment, too. I learned suddenly that there was a default and the matter somehow wandered to Justice Pittoni. I sent a telegram to the Judge asking for a stay but the Aranow, Bohlinger firm is proceeding nonetheless. It is therefore of the utmost importance that temporary injunctive relief be granted immediately with at least thirty days granted for submission of any replying papers; since I shall be unable to do so, I hope and pray that Mrs. Draznin, Mrs. Fegan and Mrs. Ebel cooperate with Mrs. Rager if she is still around and not killed, as I almost was in New Jersey on June 11, 1975, and seek all means to intervene through a top honest attorney not fearful of political reprisals because of me.

May God save America from hyprocisy and injustice!

Dated: June 23, 1975 s/Edward Rager

PROPOSED ANSWER OF DEFENDANT FLOWERVALE DATED JUNE 23, 1975

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

INLAND CREDIT CORPORATION,

Plaintiff,

v.

FLOWERVALE, INC.,

Defendant.

Defendant Flowervale, Inc., for its answer, alleges:

1. Upon information and belief, denies the allegations in paragraphs 12, 13, 14, 15, 17, 19 and 20 of the complaint.

AS A FIRST SEPARATE AND DISTINCT DEFENSE

2. Ther is an action pending in which Flowervale, Inc. is one of the plaintiffs and Inland Credit Corporation one of the defendants for the removal of this action to the Supreme Court, New York County.

3. The purpose of said action in New York County is to preclude Inland Credit Corporation and its officers and employees, including one Stanley Stern, Oscar Dane (lan attorney at law), Harold Greenstein (an attorney at law), from taking any steps whatever toward the foreclosure by Inland Credit Corproation of the property described in the complaint.

4. Among other relief sought in the New York County action is the specific performance and reformation of an agreement entered by Inland Credit Corporation, Flowervale, Inc., Edward Rager and Edwina Rager, as stockholders therein, and Inspiration Enterprises, Inc., under which Edward Rager and Edwina Rager were induced by Harold Greenstein, Oscar Dane and Stanley Stern and Ardisco Financial Corporation, a corporation owned and controlled by Inland Credit Corporation, and said Oscar Dane and Stanley Stern, to make and deliver a deed from Inspiration Enterprises, Inc., of which Edward and Edwina Rager are stockholders, which they did to said Ardisco Financial Corporation, a wholly owned subsidiary of Inland Credit Corporation, and they so delivered it on December 6, 1974, and recorded the deed on or about December 11, 1974.

5. Under the aforementioned agreement anda s a part thereof, the defendant Inland Credit Corporation, Oscar Dane, Harold Greenstein and ARdisco, agreed that they would make all reasonable and best efforts to maintain the building at 16 East 65th Street, New York County, owned by Inspiration Enterprises, Inc., up to December 6, 1974, to sell it at the best price possible, maintain it in excellent condition,m take care promptly of all repairsd and keep it as attractive as possible so as to realize a substantial surplus on its sale. * * *

6. It wa' further agreed that in meantime the mortgage alleged in the complaint would be extended to August 31, 1975, and that in no event would there be any attempt to start any foreclosure proceedings before May 31, 1975, unless the first mortgagee, the Suburbia Federal Savings and Loan Association, declared a default.

7. It was further agreed by said Dane and Greenstein, as officers of this Court, that they would make every effort possible not to foreclose the property and they would protect the savings of the investors therein, particularly one Genia Draznin, Margaret Ebel and some others.

8. The defendant Inland Credit and its officers, directors

and employees Oscar Dane, Greenstein, Stern and others, breached the aforementioned agreement malevolently, with the intent to acquire the valuable property by any means, no matter how ruthless, vile, malicious, fraudulent and lawless.

9. They intentionally breached the agreement under which they were to maintain the building at 16 East 65th Street, New York County, in an excellent condition, kept it in a dirty condition, permitted th eoil burner and the tank therein to become inoperative, permitted the flooding of the premises and the impairment of the ceilings therein, permitted a defective condition in the elevator in the building, with the emission of smoke therefrom to continue for some days until there was a fire and explosion as a result of which the elevator was out of commission for nearly two months, as a result of which it became necessary to make costly repairs to the elevator and there was also inability to show it to prospective buyers.

10. Contrary to the aforementioned agreement, they placed on the building at 16 East 65th Street, a huge ugly sign stating for IMMEDIATE SALE OR LEASE, and they advertised it in such a manner to indicate extreme anxiety to dispose of the buiulding, almost at any price, with the design not to obtain any surplus which could be applied toward the payment or reduction of the indebtedness by Flowervale to Inland Credit Corporation.

11. While the aforementioned action in the New York County was pending, the Inland Credit Corporation and its aforementioned officers and employees of Inland, resorted to the lowest, dirtiest tricks of top pettifoggery in order to confuse the issues, confuse and deceive the Court in New York County, and splintered the proceedings so that various phases of said action appeared before four different Justices of the Court, none of which had all the exhibits presented to said Court needed for the proof of Flowervale's just claims.

12. Among them were the exhibit showing the aforementioned agreements on December 6, 1974, the duplicate originals of which were stolen during the invasions of the office of Edward Rager by said Greenstein and others and upon information and belief the duplicate originals of which have been at all times in the possession of the attorneys for Inland, which they deliberately in violation of all ethics withheld from the Court.

13. Fortunately, the attorney for Flowervale, Edward Rager, had copies of those agreements with notations of various changes and they were presented in the Supreme Court, New York County with subsequent admissions before the police and otherwise that the agreements on December 6, 1974, are such as alleged herein.

14. At this very time and only about four days ago, the attorneys for Inland wrote to Supreme Court Justice Hughes of the Supreme Court, New York County, reminding him that a motion pertaining to the merits of the aforementioned New York County action was undetermined and asking him to decide it.

15. Among the various tricks used by Inland attorneys was the service of papers by employees of Inland, by unlocking the office of Edward Rager, placing the papers in some obscure place or serving papers contrary to all law in open court while it was in session. This necessitated motions to dismiss the summonses and complaints served by said attorneys in behalf of Inland against Flowervale while the main motions for the removal and consolidation of the action was pending.

AS A SEPARATE SECOND AND DISTINCT DEFENSE

16. Repeats the foregoing allegations.

17. On or about and during the months of February and

March 1972, said Greenstein and Dane solicited the placement of mortgage loans on the properties of Flowervale and its affiliates The Rose Fair, Inc. and Inspiration Enterprises, Inc., and promised to grant refinancing to enable said properties to be operated at a substantial profit and at a reasonable rate of interest.

18. They represented that they never foreclosed on any of their loans.

19. Thereafter, the son-in-law of Dane appeared on the scene and demanded that the properties of Rose Fair and Flowervale be sold to him at the total price of $1,800,000., which was far below the value of said properties.

20. When the aforementioned offer was not accepted, suddently the trms of the mortgage loan, their amounts and method of repayment, were made unusually onerous and in amounts inadequate to continue profitable operations.

21. Taking advantage of the fact that in reliance on the aforementioned promises, Flowervale, Inspiration and Rose Fair had made certain commitments and had certain pressing obligations which they were required to meet, Inland suddenly presented, without opportunity to Flowervale, Rose Fair and Inspiration to seek other financing, a mass of papers for all three enterprises at a meeting to which obligees of all three were invited on the promise of payment. Without any opportunity to read said papers and under threat of said obligees that they would take immediate hostile steps, Flowervale, Rose Fair and Inspiration were oblited to sign all papers without any opportunity to read them, with the net amounts realized far below the amounts promised.

22. Thereafter, Inland, Greenstein, Dane, Stern and their employees seized upon any excuse whatever, valid or invalid, to

threaten foreclosure and kept said Edward and Edwina Rager in a state of continuous fear of foreclosure and by publicizing it impaired the credit of Flowervale and its ability to conduct its business peacefully with security and profit.

AS A THIRD SEPARATE DEFENSE

23. The property of Flowervale has been considerably enhanced in value through the opening of a new highway on the wester side thereof, making it a most desirable place for commerce and other profitable investments and activities and it is now worth twice as much as it was in 1972.

24. The total indebtedness of Flowervale with its seven and a half acres of prime land, valued presently about six hundred thousand dollars, various buildings, residences and greenhouses of about fifty thousand square feet of glass, valued at about five hundred thousand, is below three hundred thousand dollars including the funds of the investors and the amounts of the two mortgage loans.

25. A rapid foreclosure sale, intended to accomplish the persistent fraudulent design of Inland, Dane, Stern and Greenstein, to acquire the place for a fraction of its value, would cause irreparable injury and hardship not only to Flowervale but to its aforementioned poor investors.

AS A DEFENSE AND COUNTERCLAIM AND THIRD PARTY COMPLAINT BY FLOWERVALE, INC. AGAINST INLAND CREDIT CORPORATION, HAROLD GREENSTEIN, AND STANLEY STERN AND OSCAR DANE

26. Repeats the foregoing allegations.

Plaintiff on the counterclaim Flowervale, Inc. and plaintiffs Edward Rager, Edwina Rager on the cross claim against

defendants Harold Greenstein, Oscar Dane, Stanley Stern and Inland Credit Corporation, allege:

27. Flowervale, Inc. is a New York corporation with its principal office in New York County.

28. Inland Credit Corporation is a New York corporation with its principal office in New York County.

29. Edward Rager is a resident of New York County.

30. Edwina Rager is a resident of the State of New Jersey.

31. Oscar Dane, Stanley Stern and Harold Greenstein are residents of New York County.

32. At all times herein mentioned, the defendants on the counterclaim and cross claim conspired with various persons through various fraudulent means as alleged above to acquire the property of Flowervale, Inc. by any means whatever, without any due compensation to Flowervale and with the deliberate fraudulent intent to deprive Flowervale of any equity therein and Edward and Edwina Rager, as stockholders, of any return therefrom and the loss of their interest therein.

33. That to accomplish the aforementioned purpose the defendants induced various persons to start various meritless court and other proceedings against Flowervale, Edward and Edwina Rager.

34. Among those acts by the defendants was the inducement of other persons to engage in various lawless acts including threats to the lives and liberty of Edward and Edwina Rager so as to make it impossible for them to perfect the Flowervale property and to be ever present in Suffolk County where the Flowervale property is located.

35. As a part of the foregoing scheme and design, said defendants instigated an economic and other boycott against Edward and Edwina Rager and the other enterprises in which they had an interest, including the aforementioned Rose Fair, Inspiration Enterprises and an enterprise in New Jersey known as Floral Gardens, spread various false rumors about the very sanity and integrity of Edward and Edwina Rager and conspired with various persons to render them totally helpless, insolvent and with no means and ability to defend themselves and said enterprises including Flowervale, Inc. in any litigation and from various attacks on their very lives, liberties and the capacity to earn a livelihood and have means to defend themselves.

36. Among other things, said defendants and their attorneys participated in a conspiracy with other persons and their attorneys to declare Edward and Edwina Rager unworthy of belief and spread false rumors about their capacity to work, create and function.

37. Among other things, said defendants through their attorneys and with alliance with other attorneys deluged continually since on or about December 6, 1974 and up to date, Edward and Edwina Rager, Flowervale, Rose Fair, Floral Gardens and Inspiration Enterprises, with almost simultaneous service of many Court papers and in many instances with affidavits of papers not served so as to keep them constantly in a state of confusion and inability to meet all the attacks, causing thereby many orders and judgments by defaults.

38. As a result of the foregoing, the health of Edward and Edwina Rager was gravely impaired, so was their ability to earn a livelihood, and the interests of the Ragers in the aforementioned enterprises, and particularly in Flowervale, Inc., have been greatly impaired.

39. The plaintiffs on the counterclaim and cross claim have no knowledge of all the clandestine and devious acts of conspiracy and a disclosure by said defendants is absolutely essential.

40. The plaintiffs have no adequate remedy at law and equitable and injunctive relief is immediately required lest irreparable injury results.

WHEREFORE, Flowervale, Inc. and co-plaintiffs on the counterclaim and cross claim pray for judgment as follows:

a. Dismissing the action against Flowervale;

b. Granting judgment for the reformation and specific performance of the agreement of December 6, 1974;

c. Directing full disclosure by said defendants;

d. Enjoining the defendants from further inimical conduct and acts;

e. Awarding actual and punitive damages in the amount of five hundred thousand dollars to each plaintiff on the counterclaim and cross claim from each defendant; and

f. Granting such other relief as may be just.

Dated: June 23, 1975

Edward Rager
Attorney for Flowervale, Inc. et al
16 East 65th Street
New York, New York 10021

MEMORANDUM

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART I

INLAND CREDIT CORPORATION,

Plaintiff,

-against-

INSPIRATION ENTERPRISES, INC., et al.,

Defendants.

CHIMERA, J.:

Motion for summary judgment striking the answer of defendant Virginia Cremens, for the appointment of a referee to compute the amount due plaintiff and related relief in this action to foreclose a second mortgage is granted. Defendants have failed to submit any proof to warrant the denal of this motion.

Defendant Edwina Rager has not served any formal notice of appearance in this action but on the adjourned date of this motion requested additional time to obtain new counsel for the corporate defendant in light of the disappearance of her husband-attorney Edward Rager, a co-defendant. This Court granted her until noon the following day to obtain counsel and submit opposing papers. (To this very day no papers of any significance have been submitted to this Court and no attorney has come forward in behalf of the corporate defendant.) Several letters addressed to this Court were received requesting additional time to obtain counsel and detailing unrelated matters to this Court.

It appears from the Court records that this defendant along with her husband-attorney Edward Rager and co-defendant Inspiration Enterprises Inc. have made several motions in this action which have been denied by various justices of this Court. Moreover, her failure to submit appropriate opposing papers places her in default on this motion and in answering the supplemental summons and amended verified complaint.

Accordingly, plaintiff's motion is granted in all respects. Settle order.

Dated: September 9, 1975.

s/ C. Chimera
J.S.C.

Filed October 6, 1975

ORDER OF HON. MARIO PITTONI DATED 9/3/75

SUPREME COURT—STATE OF NEW YORK
LSPECIAL TERM, PART 1.—NASSAU COUNTY

Present: HON. MARIO PITTONI, Justice.

INLAND CREDIT CORPORATION,

Plaintiff,

-against-

FLOWERVALE, INC., et al.,

Defendants.

INDEX NUMBER—SUFFOLK 75, 1968.
MOTION DATE JULY 1, 1975 — MOTION CAL. NO. 6844

The following papers numbered 1 to 7 read on this motion to open a default and vacate an order of reference

	Papers Numbered
Notice of Motion	1-4
Answering Affidavits	5-6
Pleadings	7

Upon the foregoing papers it is ordered that this motion by defendants for an order vacating a default, vacating an order of reference, staying all proceedings; or in the alternative for an order permitting defendant Flowervale, Inc. to interpose an answer on the merits is *denied* in all respects.

The moving affidavit in support of this motion fails to set forth facts indicating a reasonable excuse for the default, nor

does it present a factual basis for a meritorious defense. In the rambling, almost incoherent, mnoving affidavit by the attorney for the defendant, there is no denial that process was served, there is no explanation whatever as to why defendant defaulted, and there is no suggestion as to a meritorious defense to this action for foreclosure.

So ordered.

Dated: 9/3/75

s/M. Pittoni

In The

Supreme Court of the United States

October Term, 1979

No. 79-578

FLOWERVALE, INC., EDWINA RAGER and EDWARD RAGER,

Petitioners,

vs.

INLAND CREDIT CORPORATION, PLANTATION HOUSE & GARDEN PRODUCTS, INC., STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Were petitioners denied due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States by the granting of summary judgment to respondent, after a full consideration of the case on papers from both parties, even if error were committed by the state courts?

STATEMENT OF THE CASE

By this action, petitioners seek to vacate and set aside a judgment of foreclosure and sale dated November 28, 1975 covering a parcel of property located in Bayport, New York, (the "Flowervale Property") formerly owned by petitioner Flowervale, Inc. ("Flowervale") and further claim $10,000,000 in compensatory and punitive damages. The Flowervale Property was conveyed to respondent Inland Credit Corporation ("Inland") after judicial sale, held pursuant to that judgment of foreclosure and sale on January 7, 1976.

The foreclosure action against petitioner Flowervale resulting in the disputed judgment of foreclosure, was commenced by service of a summons and complaint on February 10, 1975. Service of that summons was made on petitioner Edward Rager, Flowervale's principal stockholder, its President, and, himself, an attorney, although he was not a party to the foreclosure action. Although Flowervale's time to do so expired on March 2nd, 1975, Mr. Rager failed to answer or otherwise appear in the foreclosure action on behalf of Flowervale. It was not until June 25, 1975 that Flowervale moved to open that default, by motion returnable July 1, 1975. A copy of a proposed answer (52a)[1] to the foreclosure complaint was attached to Mr. Rager's motion papers, identical, in almost every material respect, to the complaint (13a) in the case at bar. For example, that proposed answer alleges, in its first defense, that on December 6, 1974, Inspiration Enterprises, Inc. another Rager corporation, delivered a deed to a parcel of property in New York County to Ardisco Financial Corporation, a wholly owned subsidiary of Inland. It then alleges that the deed was delivered in consideration of an agreement by Inland to use its "best efforts" to sell that parcel of New York property and to then apply the sale proceeds first to the past due taxes and the

1. References are to pages of the appendix to the petition.

mortgage covering that New York property and then, in the event there were a surplus, to the past due taxes and mortgage covering the Flowervale Property. The answer also alleges that Inland had agreed not to foreclose the mortgage covering the Flowervale Property unless the first mortgage held by Suburbia Federal Savings and Loan Association ("Suburbia") was declared to be in default. It is finally alleged in the proposed answer that this agreement was made by Inland as part of a fraudulent scheme to trick Flowervale out of its valuable property. Thus, the first defense of the proposed answer precisely parallels the allegations in the first cause of action of the complaint at bar.

On September 3, 1975, the New York Supreme Court, Suffolk County (Pittoni, J.) denied Mr. Rager's motion to open and set aside Flowervale's default in the foreclosure stating:

> "The moving affidavit in support of this motion fails to set forth facts indicating a reasonable excuse for the default, nor does it present a factual basis for a meritorious defense. In the rambling, incoherent moving affidavit by the attorney for the defendant, there is no denial that process was served, there is no explanation whatever as to why defendant defaulted, *and there is no suggestion as to a meritorious defense to this action for foreclosure.*" (63a). (Emphasis added.)

Prior to the making of the motion, Mr. Rager, on behalf of Flowervale, had been served with all relevant papers in the foreclosure proceeding. After Mr. Justice Pittoni's decision, Inland caused Mr. Rager, as Flowervale's attorney, and indeed, as its President and chief executive officer, to be served with notice of all proceedings which took place in the foreclosure action, including notice of settlement and of entry of the judgment of foreclosure and sale and notice of the sale itself,

which, as noted, took place on January 7, 1976, after due notice thereof had been published.

Both the proposed answer attached to Mr. Rager's motion, and the complaint in the case at bar are grounded in an imaginary agreement by Inland not to foreclose its mortgage on the Flowervale Property unless the first mortgage held by Suburbia was about to be foreclosed. The only notation of that so-called "agreement" by Inland are unintelligible pen additions made by Edward Rager, without Inland's knowledge or consent on a copy of Inland's December 4th letter (45a) to Mrs. Rager, which the lower court in this case was unable to read, and found, in its decision (3a, 5a) from merely reading the documents submitted, had not been initialled or agreed to by Inland.

Thus, the only agreement in the record below which pertains to the Flowervale Property is that attached to the complaint as Exhibit B, the letter of November 27, 1974, (26a) which does no more than extend payment of Inland's mortgage, *provided Flowervale paid all installments of taxes and of principal and interest under the Suburbia Mortgage.* There has never been any contention made that Flowervale made those payments because the fact is that Flowervale was always in default. It was also undisputed in the lower court that Flowervale received notice of all proceedings in the foreclosure and defaulted.

Based upon the foregoing facts, respondents moved for summary judgment in the instant case on the ground, among others, that the complaint failed to plead facts demonstrating that the judgment of foreclosure and sale in the foreclosure action had been obtained by fraud or other improper means as petitioners were required to show by law. The motion was granted by written decision dated December 1st, 1977 (3a) and judgment was entered in accordance therewith on January 13, 1978 (8a).

On or about January 31, 1978, the petitioners moved to vacate and set aside the January 13th, 1978 judgment alleging that "new and additional facts" purportedly not before the court on the original motion for summary judgment had been discovered. On May 11th, 1978, the New York Supreme Court, Suffolk County (Underwood, J.) denied that motion for renewal and reargument (7a). Petitioners appealed from both the judgment of January 13th, 1978 and the order denying reargument or renewal to the New York Supreme Court, Appellate Division, Second Department, and the two appeals were consolidated by order of that court dated July 6, 1978. By order dated April 2nd, 1979, (10a), the Appellate Division unanimously affirmed that judgment and dismissed the appeal from the May 11th order, denying reargument. On July 10, 1979, the New York Court of Appeals denied leave to appeal (12a). This petition followed.

REASON FOR DENYING THE WRIT

Petitioners' right to due process of law was not denied by the granting of summary judgment to respondents after a full consideration of the case on its merits, even if such granting was error.

It has long been settled that procedural due process under the Fifth and Fourteenth Amendments to the Constitution is satisfied if a party is given proper and adequate notice and a meaningful opportunity to be heard. *Boddie v. Connecticut,* 401 U.S. 371, 377 (1971). Nor does that requirement for notice and a meaningful opportunity to be heard mandate that state procedure take any particular form. *Mitchell v. W.T. Grant Co.,* 416 U.S. 500, 510 (1974); *Stump v. Bennett,* 398 F.2d 111, 113-114 (8th Cir. 1968), *cert. denied,* 393 U.S. 1001 (1969). Clearly then, the time honored procedure of summary judgment comes within the limits prescribed by the due process clause. There has never been any question that summary judgment, while denying to a litigant a plenary trial because there are no issues of

material fact to be tried, does not offend the traditional notions of due process. *Ogelsby v. Terminal Transport Co., Inc., etc.*, 543 F.2d 1111 (5th Cir. 1976); *Smart v. Jones*, 530 F.2d 64 (5th Cir. 1976); *Sarela v. Porikos*, 320 F.2d 827 (7th Cir. 1963). The *Ogelsby* case, *supra*, clearly expresses the rule:

> "Ogelsby also contends that the entry of summary judgment in accordance with Fed. R. Civ. P. 56 violates . . . his Fifth Amendment right not to be deprived of property without due process of law. These contentions are meritless. Rule 56 requires due notice of the invocation of its procedures and outlines the type of response required to avoid its strictures. Ogelsby does not dispute that he got this notice. Indeed, his counsel prepared a response supported by a brief and Ogelsby's unsworn statement. Due process does not require more. No constitutional right to a trial exists when after notice and a reasonable opportunity a party fails to make the rule — required demonstration that some dispute of material fact exists which a trial could resolve." *Id.* at 1113.

As in the *Ogelsby* case, petitioners do not deny that they received notice of the motion for summary judgment and submitted full and complete papers, including an extensive brief in opposition thereto, all as provided for in *New York Civil Practice Law and Rules*, R. 3212, (McKinney). They do not deny that they again submitted full papers on yet another motion to reargue, after summary judgment had been granted, and that an extensive brief was submitted by them to the Appellate Division, Second Department, on petitioners' appeal.

In short, the entire basis for this petition is petitioners' erroneous contention that the state courts erred in granting summary judgment to petitioners. Even had that been the case,

it has long been settled that an error of a state court, if otherwise proper procedures have been followed, does not violate due process. *Gryger v. Burke*, 334 U.S. 728 (1948); *Wooster County Trust Co. v. Riley*, 302 U.S. 292, 299 (1937); *Thompson, et al. v. Butler, et al.*, 136 F.2d 644, 648 (8th Cir. 1943); *East Crossroads Center, Inc. v. Mellon-Stuart Company, etc.*, 245 F. Supp. 191, 194 (W.D. Pennsylvania, 1965). In the *Gryger* case, *supra*, this Court stated as follows:

> "Nothing in the record impeaches the fairness and temperateness with which the Trial Judge approached his task. His actions have been affirmed by the highest court of the Commonwealth [of Pennsylvania]. We are not at liberty to conjecture that the Trial Court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation for a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question." 334 U.S. at 731.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARTIN IRA KLEIN
OLSHAN, GRUNDMAN & FROME
Attorneys for Respondents

RICHARD H. ABELSON
DANIEL BESDIN
Of Counsel

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979
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FLOWERVALE, INC., EDWINA RAGER
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INLAND CREDIT CORPORATION, PLANTATION HOUSE & GARDEN PRODUCTS, INC., STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN,

Respondents.

PETITIONERS' REPLY BRIEF

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HOUSE & GARDEN PRODUCTS, INC.,
STANLEY E. STERN, OSCAR DANE
and HAROLD GREENSTEIN,

Respondents.

PETITIONERS' REPLY BRIEF

The Petitioners respectfully submit this Reply Brief in response to the Respondents' Brief in opposition to the Petition for a Writ of Certiorari.

The Respondents misleadingly represent to the Court that there was no written agreement signed between the parties on December 6, 1974, (Resp. Br. p. 4).

In reply, we respectfully submit that the central issue as to whether or not there was such an agreement constituted an issue of material fact which absolutely precluded the granting of summary judgment in the state court below.

That agreement was admittedly signed by the Respondents in examinations before trial given by the Respondents Dane and Greenstein (Petition p. 22). The agreement was documented on the Respondent Inland Credit Corporation's own letterhead (Petition, A25a). The agreement was signed and initialled by the Respondents simultaneously with and in consideration of the transfer of Petitioners' real property to Respondents on December 6, 1974, pursuant to the terms thereof, specifically as alleged in paragraphs 17 to 21 incl. of Petitioners' verified complaint (17a-19a).

On this indisputable documentation, the grant of summary judgment was not mere "error," as contended by Respondents (pp. 5-7), but constituted error of constitutional magnitude, in flagrant violation of the State's statutory powers and the judicial precedents thereunder, thus depriving Petitioners of substantial rights without due process of law.

The constitutional principle asserted by Petitioners at bar was clearly set forth in *Boddie v. Connecticut,* 401 US 371, 375 (1971), wherein the Court stated:

> "At its core, the right to due process reflects a fundamental value in our American constitutional system * * * system * * *
>
> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a 'legal system,' social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the 'state of nature.' * * * .

> *It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement.* Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle." (Emphasis supplied).

And further, at pp. 377-8:

> "* * * due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that '[w]herever one is assailed in his person or his property, there he may defend,' Windsor v. McVeigh, 93 US 274, 277, 23 L. Ed 914, 915 (1876). See Baldwin v. Hale, 1 Wall 223, 17 L Ed 531 (1864); Hovey v. Elliott, 167 US 409, 42 L Ed 215, 17 S Ct 841 (1897). The theme that 'due process of law signifies a right to be heard in one's defence,' Hovey v. Elliott, supra, at 417, 42 L. Ed. at 221, has continually recurred in the years since Baldwin, Windsor, and Hovey. Although '[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the Court in Mullane v. Central Hanover Tr. Co., 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950), 'there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Id., at 313, 94 L Ed at 873."

The test of due process cannot be resolved on the narrow ground, asserted by Respondents, that the Petitioners were merely "served with notice of all proceedings which took place in the foreclosure action" (Resp. Br. pp. 3-4). The crucial test is, rather, whether Petitioners had a fair opportunity to be heard in view of the indisputably documented incapacity of Edward Rager as attorney to defend the mortgage foreclosure proceeding on behalf of the Petitioners, as specifically alleged in paragraphs 21, 21a and 39 of Petitioners' two causes of action (App. 36a-37a, 42a).

That documentation is graphically shown by Respondents' own several admissions unequivocally acknowledging his mental illness and incapacity to represent the Petitioners (Pet. Br. pp. 34-35); by the personal observations of his wife, the Petitioner Edwina Rager (Pet. Br. pp. 34-35); by the court records of judicial decisions and records conclusively attesting thereto, particularly including the decision by Mr. Justice Pittoni of Suffolk County denying Edward Rager's motion to open his default to answer the mortgage foreclosure proceeding because of *"the rambling, almost incoherent, moving affidavit by the attorney for the defendant"* (Pet. Br. p. 23); by the contemporaneous decision of Mr. Justice Helman, Supreme Court, New York County, as characterizing *"incomprehensible"* Edward Rager's bizarre motion to "consolidate" the Suffolk County foreclosure proceeding with the virtually identical foreclosure proceeding pending in New York County (Pet. Br. 24); and by the interrelated decision thereto by Mr. Justice Hughes, again rejecting Petitioner's new papers submitted as the *"almost incoherent affidavit of Mr. Edward Rager, counsel for movants"* (Pet. Br. p. 25).

On the conclusively established triable facts documented herein, the denial to Petitioners of a fair opportunity to be heard is plainly abhorrent to the Due Process Clause of the Constitution, contrary to the long-settled judicial precedents laid down by this Court as well as by the state court below, and is totally alien to the rule of equal justice under law.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

AARON NUSSBAUM
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Brooklyn, New York 11241

Counsel for Petitioners.

November 9, 1979